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21.02



No. 15178

United States
Court of Appeals
for the Ninth Circuit

ONG WAY JONG, alias Johnny Ong and WEE
ZEE YEP, Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern
District of California, Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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HERRON AND WINN,

345 Grove Street,

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Attorneys for Defendant and Appellant,

Ong Way Jong.

GEORGE T. DAVIS,

98 Post Street,

San Francisco, California,

Attorney for Appellant, Wee Zee Yep.

In The United States District Court for the Northern District of California, Southern Division

Criminal No. 34979

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WEE ZEE YEP and ONG WAY JONG,

alias Johnny Ong,

Defendants.

INDICTMENT

(Violation: Secs. 4704 and 7237, Title 26 USC (1954 Ed.), Harrison Narcotic Act; Sec. 174, Title 21 USC, Jones-Miller Act; Sec. 371, Title 18 USC—Unlawful Sale and Possession of Heroin and Conspiracy.)

First Count: (Secs. 4704 and 7237 of Title 26 U.S.C. (1954 Ed.), Harrison Narcotic Act.)

The Grand Jury charges:

That on or about the 1st day of February, 1956, in the City and County of San Francisco, State and Northern District of California, defendant Wee Zee Yep unlawfully did sell, dispense and distribute, not in or from the original stamped package, a certain quantity of a narcotic drug, to-wit, approximately 1 ounce and 36 grains of heroin.

Second Count: (21 U.S.C., 174, Jones-Miller Act.)

The Grand Jury further charges:

That at the time and place mentioned in the first count of this indictment, within said Division and District, defendant Wee Zee Yep fraudulently and knowingly did conceal and facilitate the concealment and transportation of a certain quantity of a narcotic drug, to-wit, approximately 1 ounce and 36 grains of heroin, and the said heroin had been imported into the United States of America contrary to law as defendant Wee Zee Yep then and there well knew.

Third Count: (18 U.S.C., Section 371)

The Grand Jury further charges:

1. That at a time and place to the Grand Jury unknown, defendants Wee Zee Yep and Ong Way Jong, alias Johnny Ong, and others to the Grand Jury unknown, did knowingly and wilfully conspire together.

2. That the objects of said conspiracy were to sell, dispense and distribute, not in or from the original stamped packages, quantities of narcotic drugs, to-wit, heroin, in violation of Sections 4704 and 7237 of Title 26 United States Code (1954 Ed.), and to conceal and facilitate the concealment and transportation of quantities of narcotic drugs, to-wit, heroin, which had been imported into the United States of America contrary to law in violation of Section 174 of Title 21 United States Code.

3. That in pursuance of said conspiracy and to effect the objects thereof, in the Northern District

of California, Southern Division, defendants Wee Zee Yep and Ong Way Jong, alias Johnny Ong, did the following overt acts:

Overt Acts

1. On or about February 1, 1956 at San Francisco, California, defendant Wee Zee Yep sold a quantity of heroin for the sum of \$600.

2. On or about February 1, 1956 defendant Wee Zee Yep entered a residence at 83 Winfield Street, San Francisco, California.

3. On or about February 1, 1956, in the City and County of San Francisco, defendants Wee Zee Yep and Ong Way Jong, alias Johnny Ong, traveled together in a 1951 Cadillac Coupe bearing California license number CKC 040.

4. On or about February 1, 1956 defendant Wee Zee Yep met defendant Ong Way Jong, alias Johnny Ong, at 1003 Jackson Street, San Francisco, California.

A True Bill.

/s/ FRED M. MARTIN,

Foreman

/s/ LLOYD H. BURKE,

United States Attorney

Approved as to Form: rhs.

(Violation: 4704 and 7237, 26 USC (1954 Ed), Harrison Narcotic Act; 21 USC 174, Jones-Miller Act; 18 USC 371—Unlawful sale and possession of heroin and conspiracy. Penalty: Counts 1 and 2—

Fine of not more than \$2,000 and imprisonment for not less than 2 nor more than 5 years. Count 3—\$10,000 and/or 5 years.)

[Endorsed]: Filed March 7, 1956.

[Title of District Court and Cause.]

WAIVER OF JURY TRIAL

In conformity with Rule 23 of the Rules of Criminal Procedure for the District Courts of the United States, effective March 21, 1946, we, the undersigned, do hereby waive trial by jury and request that the above entitled cause be tried before the Court sitting without a jury.

Dated: San Francisco, California,, 19..

/s/ WEE ZEE YEP,
Defendant

/s/ GUS C. RINGOLE,
Attorney for Defendant

/s/ DONALD B. CONSTINE,
Assistant U. S. Attorney

Approved:

/s/ O. D. HAMLIN,
Judge, United States District
Court, Northern District of
California.

[Endorsed]: Filed April 20, 1956.

[Title of District Court and Cause.]

WAIVER OF JURY TRIAL

In conformity with Rule 23 of the Rules of Criminal Procedure for the District Courts of the United States, effective March 21, 1946, we, the undersigned, do hereby waive trial by jury and request that the above entitled cause be tried before the Court sitting without a jury.

Dated: San Francisco, California,, 19...

/s/ JOHNNY ONG,

Defendant

/s/ JOHN M. RIORDAN,

Attorney for Defendant

/s/ DONALD B. CONSTINE,

Assistant U. S. Attorney

Approved:

/s/ O. D. HAMLIN,

Judge, United States District
Court, Northern District of
California.

[Endorsed]: Filed April 20, 1956.

United States District Court for the Northern
District of California, Southern Division

At a stated term of the United States District Court for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Thurs-

day, the 8th day of March, in the year of our Lord one thousand nine hundred and fifty-six.

Present: The Honorable Michael J. Roche, District Judge.

United States of America v. Ong Way Jong.

This case came on regularly this day for arraignment. The defendant was present in custody of United States Marshal and with his attorney, John Riordan, Jr., Esq. *John H. Riordan, Jr., Esq.*, Assistant U. S. Attorney, was present on behalf of the United States.

Defendant was arraigned upon the indictment filed herein against him, stated his true name as charged. Counsel waived reading indictment, substance of charge was stated to defendant, and copy of indictment handed to him. Defendant stated he understood the charge against him.

Defendant was called to plead and thereupon said defendant entered a plea of Not Guilty to the indictment, which plea was ordered entered.

Counsel made motion for reduction of bail to \$5,000.00, which motion was ordered granted.

Ordered case continued to March 15, 1956, to be set for trial. Ordered that defendant be remanded to custody in default of bail.

United States District Court for the Northern
District of California, Southern Division

At a stated term of the United States District
Court for the Northern District of California,

Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 12th day of March, in the year of our Lord one thousand nine hundred and fifty-six.

Present: The Honorable Michael J. Roche, District Judge.

United States of America v. Wee Zee Yep.

This case came on regularly this day for entry of plea. The defendant Wee Zee Yep was present in custody of United States Marshal and with his attorney, Gus Ringole, Esq. John H. Riordan, Jr., Esq., Assistant United States Attorney, was present on behalf of the United States.

The defendant was called to plead and thereupon said defendant entered a plea of Guilty to Count 2 of indictment; and Not Guilty as to Counts 1 and 3 of indictment, which plea the Court ordered entered.

After hearing counsel, ordered case continued to March 19, 1956, for judgment as to Count 2; and to be set for trial as to Counts 1 and 3.

United States District Court for the Northern
District of California, Southern Division

At a stated term of the United States District Court for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Thurs-

day, the 10th day of May, in the year of our Lord one thousand nine hundred and fifty-six.

Present: The Honorable Michael J. Roche, District Judge.

United States of America v. Ong Way Jong.

This case came on regularly this day for hearing motion for new trial and for pronouncing of judgment. Defendant was present in custody of United States Marshal and with his attorney John Riordan, Esq. Donald B. Constine, Esq., Assistant United States Attorney, was present on behalf of the United States. T. Hanson, Probation Officer, was present.

After hearing counsel, ordered that motion for new trial be, and the same is hereby, denied.

Defendant was called for judgment. The Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) Years and pay a fine in the sum of One Dollar (\$1.00) to the United States of America on Count 3 of indictment.

The Court recommends commitment to an insti-

tution to be designated by the United States Attorney General.

Ordered that judgment be entered herein accordingly.

United States District Court for the Northern
District of California, Southern Division

No. 34979

UNITED STATES OF AMERICA

v.

ONG WAY JONG, alias Jonny Ong.

JUDGMENT AND COMMITMENT

On this 10th day of May, 1956 came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a finding of guilty of the offense of violation of Title 18 USC, Sec. 371—Conspiracy.

(At a time and place unknown, defendants Ong Way Jong, alias Jonny Ong, and others to the Grand Jury unknown, did knowingly and wilfully conspire together. The objects of said conspiracy were to sell, dispense and distribute, not in or from the original stamped packages, quantities of narcotic drugs, to-wit, heroin, in viol. §§4704 and 7237, 26 USC, 1954 Ed.; and to conceal and facilitate the

concealment and transportation of heroin which had been imported into the United States of America contrary to law in viol. of §174, 21 U.S.C. In pursuance of said conspiracy and to effect the objects thereof, in the Nor. Dist. of Calif., Southern Division, defendant Ong Way Jong, alias Jonny Ong, on or about Feb. 1, 1956 at San Francisco did certain overt acts), as charged in Count 3 of indictment; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years and pay a fine in the sum of One Dollar (\$1.00) to the United States of America on Count 3 of indictment.

(Indictment—3 counts. Defendant not named in Counts 1 and 2.)

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ MICHAEL J. ROCHE,
United States District Judge

Examined by:

/s/ DONALD B. CONSTINE,
Assistant U. S. Attorney

The Court recommends commitment to an institution to be designated by U. S. Attorney General.

C. W. CALBREATH,
Clerk

/s/ By J. P. WELSH,
Deputy Clerk

Entered in Criminal Docket 5-15 1956, June 11, 1956.

[Endorsed]: Judgment and Commitment filed this 14th day of May, 1956.

United States District Court for the Northern
District of California, Southern Division

No. 34979

UNITED STATES OF AMERICA

v.

WEE ZEE YEP

JUDGMENT AND COMMITMENT

On this 17th day of May, 1956 came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a finding of guilty as to Counts 1 and 3; defendant pleaded guilty to Count 2. Offenses charged being:

Count 1 — §§4704 and 7237, 26 USC 1954 Ed.

Harrison Narcotic Act—(Feb. 1, 1956, San Francisco, unlawful sale of approximately 1 ounce and 36 grains of heroin);

Count 2—21 USC 174, Jones-Miller Act—(at said time and place defendant unlawfully possessed aforesaid heroin);

Count 3—18 USC 371—Conspiracy. (At a time and place unknown defendants Wee Zee Yep, et al., and others unknown, did knowingly and wilfully conspire together. Objects of said conspiracy was to unlawfully sell heroin (§§4704 and 7237, 26 USC 1954 Ed.); and to conceal and facilitate the concealment and transportation of quantities of narcotic drugs, heroin, which had been imported into USA contrary to law (§174, 21 USC). In pursuance of said conspiracy and to effect objects thereof on three occasions on or about Feb. 1, 1956 at San Francisco said defendant Wee Zee Yep did certain overt acts),

as charged in Counts 1, 2, 3 of indictment; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of: Count 1—two (2) years and fined one dollar (\$1.00), Count 2—two (2) years and fined

one dollar (\$1.00), Count 3—five (5) years and fined one dollar (\$1.00).

Ordered that said terms of imprisonment run concurrently.

Further Ordered that said terms of imprisonment this day imposed by this Court on Counts 1, 2, 3 of indictment No. 34979 run from and after the expiration of term of imprisonment imposed in case No. 34978, U. S. vs. Wee Zee Yep.

Totals: No. 34979—5 years and fined \$3.00, No. 34978—5 years and fined \$2.00 = 10 years and \$5.00.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ MICHAEL J. ROCHE,
United States District Judge

Examined by:

/s/ DONALD B. CONSTINE,
Assistant U. S. Attorney

The Court recommends commitment to an institution to be designated by U. S. Attorney General.

C. W. CALBREATH,
Clerk

Recapitulation:

34978.....	5 years and	\$2.00
34979.....	5 years and	\$3.00
34980.....	5 years and	\$5.00

15 years and \$10.00

(See U. S. v. Wee Zee Yep, Nos. 34978, 34979, 34980.)

Entered in Criminal Docket 5-24 1956, June 11, 1956.

[Endorsed]: Judgment and commitment filed this 23rd day of May, 1956.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR NEW TRIAL

To Lloyd H. Burke, United States Attorney and Donald Constine, Assistant United States Attorney:

You and Each of You Will Please Take Notice that upon the attached motion for a new trial, filed the 4th day of May, 1956 with the Clerk of the United States District Court for the Northern District of California, Southern Division in San Francisco, California, the above named defendant Ong Way Jong alias Johnny Ong, will move for a new trial upon the indictment found against the defendant and upon all the proceedings heretofore had herein, said motion will be made in the United States District Courthouse located in the Postoffice Building at 7th and Mission Streets in the City and County of San Francisco, in Room No. 338 before the Honorable Michael J. Roche on the 10th day of May, 1956 at the opening of Court on that day, or as soon thereafter as counsel can be heard for an Order granting a new trial and for such other and

further relief as to the Court may seem just and proper.

/s/ JOHN M. RIORDAN,

Attorney for Defendant Ong

Way Jong, alias Johnny Ong

Acknowledgment of Service Attached.

[Endorsed]: Filed May 4, 1956.

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

The defendant Ong Way Jong alias Johnny Ong moves the Court to grant him a new trial for the following reasons:

1. The Court erred in denying defendant's motion for acquittal at the conclusion of the evidence.
2. The verdict is contrary to the weight of the evidence.
3. The verdict is not supported by substantial evidence.
4. The Court erred in admitting testimony of all government witnesses to which objections were made.

/s/ JOHN M. RIORDAN,

Attorney for Defendant Ong

Way Jong alias Johnny Ong

[Endorsed]: Filed May 4, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Ong Way Jong, alias Johnny Ong, one of the defendants in the cause numbered and entitled as above, appeals to the United States Court of Appeals for the Ninth Circuit from the judgment heretofore, to wit, given, made and entered by the United States District Court on the 10th day of May, 1956, wherein the said defendant was sentenced to five years in a Federal Penitentiary in addition to a fine in the sum of \$100.00.

Dated: This 17th day of May, 1956.

HERRON & WINN,

/s/ By FRED R. WINN,

Attorneys for Defendant, Ong
Way Jong alias Johnny Ong

[Endorsed]: Filed May 17, 1956.

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEYS

Notice is hereby given that Ong Way Jong, alias Johnny Ong, one of the defendants in the action depending in the said District Court and numbered and entitled as above, hereby by and through Jennie Ong, his wife and next friend, and thereunto duly authorized, has substituted and does hereby substi-

tute Herron & Winn as his attorneys in said cause in the place instead of John M. Riordan, Esq.

Dated: This 16th day of May, 1956.

ONG WAY JONG,
Alias Johnny Ong
/s/ By JENNIE ONG

I hereby consent to the said substitution.

/s/ JOHN M. RIORDAN

We hereby accept the said substitution.

HERRON & WINN,
/s/ By FRED R. WINN

[Endorsed]: Filed May 17, 1956.

[Title of District Court and Cause.]

To: The Clerk, United States District Court,
Northern District of California.

Please take notice that the undersigned defendant in the cause: United States of America vs. Wee Zee Yep, and in which cause defendant was sentenced to a term of imprisonment by Hon. Michael J. Roche, Chief United States District Judge on the 17th day of May, 1956, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the conviction, judgment, sentence and denial of a motion for a new trial.

Said defendant: hereby files said notice of appeal

in propria persona pending his securing new and different counsel to represent him in said appeal.

Dated: May 19, 1956.

/s/ WEE ZEE YEP,

Defendant, pro per

#1 Dunbar Lane,

San Francisco, California

Defendant-appellant hereby elects not to commence service of the sentence imposed upon him pending his securing new council and until further notice to the contrary.

Dated: May 19, 1956.

WEE ZEE YEP

[Endorsed]: Filed May 24, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name of appellant: Wee Zee Yep.

Name and address of appellant's attorney: George T. Davis, 98 Post Street, San Francisco 4, California.

Offense: Unlawful sale and possession of Heroin and conspiracy.

Judgment: Judgment of guilty entered May 23, 1956, sentencing appellant to 2 years and a fine of \$1.00 on Count 1, 2 years and a fine of \$1.00 on Count 2, and 5 years and a fine of \$1.00 on Count 3,

to run concurrently after the expiration of the sentence imposed on appellant in Case No. 34978.

Institution where confined: San Francisco County Jail.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated: June 26, 1956.

/s/ GEORGE T. DAVIS,
Attorney for Appellant

Affidavit of Service by Mail Attached.

[Endorsed]: Filed June 27, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellants:

Indictment

Waiver of Jury Trial for Yep and Jong

Minutes for March 8th, March 12th and May 10th

Judgment and Commitment for Jong

Judgment and Commitment for Yep

Notice of Motion for New Trial for Jong

Motion for a New Trial for Jong

Reporter's Transcript for Jong

Notice of Appeal for Jong

Notice of Appeal for Yep (letter)

Notice of Appeal for Yep

Designation of Contents of Record on Appeal for
Jong

Amended Designation of Contents of Record on
Appeal for Jong

Designation of Contents of Record on Appeal

In Witness Whereof, I have hereunto set my
hand and affixed the seal of said District Court, this
28th day of June, 1956.

[Seal]

C. W. CALBREATH,
Clerk

/s/ WM. J. FLINN,
Deputy Clerk

In the United States District Court for the Northern District of California, Southern Division

No. 34979

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WEE ZEE YEP and ONG WAY JONG, alias
JOHNNY ONG, Defendants.

Before: Hon. Michael J. Roche, Judge.

REPORTER'S TRANSCRIPT

April 25 and 26, 1956

Appearances: For the Government: Hon. Lloyd H. Burke, United States Attorney, by Donald B. Constine, Esq., Asst. U. S. Attorney. For the Defendants: Wee Zee Yep: Gus C. Ringole, Esq. Johnny Ong: John M. Riordan, Esq. [1*]

The Clerk: United States versus Yep and Ong, for trial.

Mr. Constine: Ready for the United States.

Mr. Riordan: Ready for Ong.

Mr. Ringole: Ready.

Mr. Constine: May it please Your Honor, this is a court trial in connection with the defendant Yep who has been before Your Honor in two other cases, and the defendant Johnny Ong, represented by

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

counsel, who has not been before Your Honor before. Both defendants have waived trial by jury.

This is a case that was mentioned yesterday that was assigned to Your Honor, pursuant to Your Honor's wishes, for court trial.

The Court: You conveyed the message, did you?

Mr. Constine: Yes, I did, yes, Your Honor, yesterday morning.

Mr. Ringole: Pardon me, Your Honor, I conveyed it.

Mr. Constine: Excuse me, Your Honor. I talked to Mr. Robb yesterday morning as soon as I left the courtroom.

The Court: All right.

Mr. Constine: May it please Your Honor, inasmuch as this is a conspiracy case plus the substantive offenses, I wish to make a brief opening statement of what the Government intends to prove.

This indictment was returned by the Grand Jury in three [4] counts. It charges the defendant Yep with the transfer of a quantity of heroin on February 1st of this year; the second count charges him with the possession of that heroin, while the third count charges the defendant Yep and the defendant Ong with conspiracy to violate the narcotic statutes.

The defendant Yep has plead guilty to the possession of the heroin. However, he has plead not guilty to the transfer of that heroin, and he and Ong have plead not guilty to the conspiracy count.

I might say that this will be a relatively simple case. Much of the proof in this particular indict-

ment will center around the transaction of February 1st.

The primary witness, Your Honor, for the Government will be Mr. Wilton Wu, who sits at my left, a United States Treasury agent who in this case operated in an undercover capacity pretending to be a narcotic purchaser from Denver, Colorado.

The evidence that will be introduced will show that the defendant Yep is a narcotic peddler of some substance, having been selling heroin in this community in large quantities for approximately four years.

The proof will show that he had a number of sources for his heroin, one source Caucasian seaman who sailed between Hongkong and the United States. I might state, just as an aside, that that was the case that was before Your [5] Honor yesterday—the activities of this defendant and the seaman, Mr. Houk, who I might say plead guilty before Your Honor yesterday.

However, the defendant had other sources of narcotics within this community, and it is the Government's contention, of course, that one of these other sources was the defendant Johnny Ong.

In the middle of January Mr. Wu, in the undercover capacity, we will show met the defendant Yep and negotiated for a sale of narcotics, which actually took place.

Yep explained that his seaman friend, the man that was before Your Honor yesterday, was still out at sea and not available, and, therefore, he had to turn to another connection, a good friend of his

that he had in San Francisco. We will show that other connection was the defendant Johnny Ong.

On January 23rd we will show that Mr. Wu purchased from Mr. Yep two ounces of heroin. On February 1st we will show that Mr. Wu purchased another ounce of heroin from Mr. Yep, and it is on this transaction that the agents observed Mr. Yep and Mr. Ong in the conspiracy as both defendants were under constant surveillance for the most part during that day, February 1st.

Now the remaining link—the proof will show that the defendant Yep identified the defendant Johnny Ong as his [6] connection, as one of his sources of narcotics, and he described him as an unemployed ex-bookie, gambler, who owned a 1955 Cadillac and who had no job at the particular time.

I say that because the Government will show that it was this 1955 Cadillac that was offered by the defendant Yep as security in the narcotic transaction with Mr. Wu.

We will also show that after an additional sale when both defendants were apprehended and arrested, the defendant Ong was confronted with the fact that the agents believed him to be involved in this narcotic transaction on February 1st, they accused him of delivering the narcotics to Mr. Yep, and in the light of this accusation the defendant remained silent and made no statement or explanation at all, although he did admit that he had had no job for over a year and was unemployed.

There are a number of agents that the Government will call in this case, Your Honor. It will be

something that can be compared to a jigsaw puzzle. Each agent can only testify to what he saw or what he observed; it will not be until all the agents testify before Your Honor that the complete picture of the defendant Ong's guilt and the defendant Yep's guilt will be made clear.

Mr. Riordan: May it please the Court, at this time in view of the Government's opening statement I would like to move for a dismissal. [7]

The Government in substance related the acts that were performed by Mr. Yep, and the Government's statement in relation to Mr. Ong was merely that they met on various occasions on the first day of February.

Apparently this is a conspiracy. Constant authorities, frequent authorities hold that a mere meeting alone doesn't give rise to even an inference of a conspiracy.

Apparently from that source or that supposedly overt act, they discussed various hearsay statements which were made apparently, or at least by the Government's intention, by Mr. Wee Zee Yep which have only a tendency or an inclination from which inference is alone to be drawn that Mr. Ong was involved.

In view of the opening statement of the Government in which no conspiracy is discussed, no overt act is put before the Court, and mere hearsay is brought in to connect my client, Mr. Ong, with this matter, I hereby move for an acquittal of Mr. Ong at this time.

Mr. Constine: Mr. Ringole, do you wish to make a statement?

Mr. Ringole: I will join with counsel in that motion.

The Court: What is that?

Mr. Constine: He says he will join with Mr. Riordan in that motion.

I will only say that this is somewhat novel; that I [8] didn't consider myself a witness. I am only stating what we intend to prove and that we will prove him guilty of a conspiracy. The evidence has to be introduced before Your Honor can take any action on a motion to dismiss. We are going to prove him guilty of the charges filed against him by the Grand Jury, which is conspiracy. I merely outlined briefly what the evidence will prove. I did not state what the agents will testify to. We will produce the agents and Your Honor will hear them.

The Court: The motions and each of them will be denied.

Mr. Ringole: May I state, Your Honor, in accordance with what has been my policy with the defendant Yep to save any time and trouble, that I have had him plead guilty to a number of the counts in the three indictments against him. I requested the United States Attorney after the plea to dismiss the others, and they refused to do so.

In this particular indictment, this being one of the three, he had heretofore plead guilty before Your Honor of the second count—. Is that right?

Mr. Constine: Possession. That's right.

Mr. Ringole: Yes, the second count. Now then, in

order to save time, in view of the attitude of the Government making this man as I called him the "Book-of-the-Month Club" defendant—they will not dismiss any of these counts—they will change his plea to the second count. [9]

Mr. Constine: He has already plead to that.

Mr. Ringole: To the first count.

Mr. Constine: Does he wish to change his plea to the third count of the indictment?

Mr. Ringole: No, not to the third count. I am speaking of the count to which he will change his plea—to the first count. He will plead guilty to that count.

The Court: I shall at this time take it under advisement.

Mr. Ringole: All right, Your Honor.

The Court: Proceed.

Mr. Constine: Mr. Gowans.

WILLIAM J. GOWANS

called as a witness on behalf of the Government;
sworn.

The Court: Your full name, please?

A. William J. Gowans.

The Court: Your business or occupation?

A. I am a chemist employed by the U. S. Treasury Department.

The Court: How long have you been so engaged?

A. I have been employed by the Treasury Department fifteen months.

Q. Prior to that time?

(Testimony of William J. Gowans.)

A. I worked as an analytical chemist for approximately ten years. [10]

The Court: Take the witness.

Mr. Constine: Did I understand from Mr. Ringole that you wish to stipulate to his qualifications as a chemist?

Mr. Ringole: Oh, yes. Why, certainly. It is proposed that he introduce some heroin in evidence. If he tells us that is heroin, that goes with me.

The Court: Very well. What about you?

Mr. Riordan: I don't see much advantage to me in stipulating to anything, Your Honor.

The Court: Do you stipulate as to his qualifications?

Mr. Riordan: I will stipulate to his qualifications in view of the foregoing questions and answers; yes, Your Honor.

The Court: Very well. Let the record so show.

Direct Examination

Q. (By Mr. Constine): Mr. Gowans, is heroin a narcotic? A. It is.

Q. And what is its source? In other words, what is it a derivative of?

A. It is a derivative of opium.

Q. Mr. Gowans, have you brought with you two exhibits at the request of the United States Attorney? A. I have.

Q. Would you kindly produce those exhibits for me, please? A. I have them.

Mr. Constine: May this exhibit that is already

(Testimony of William J. Gowans.)

marked [11] Exhibit 1 be marked Exhibit 1 for identification for the Government?

The Court: It will be so marked for identification.

The Clerk: Government's Exhibit 1 marked for identification.

(Whereupon packet referred to above was marked U. S. Exhibit No. 1 for identification.)

Mr. Constine: May the second packet that is already marked 2 be marked Exhibit 2 for identification on behalf of the Government?

The Court: Let it be admitted for the purpose of identification next in order.

The Clerk: Government's Exhibit 2 for identification.

(Whereupon packet referred to above was marked U. S. Exhibit No. 2 for identification.)

Q. (By Mr. Constine): Now, Mr. Gowans, I will hand you Government's Exhibit 1 for identification and Government's Exhibit 2 for identification and ask you whether you have ever seen those packets before. A. I have.

Q. Where have they been or where did you take them from?

A. I received these packages from Agent Wu.

Q. And do you know the approximate dates?

A. I received Exhibit No. 1 on January 24, 1956 and Exhibit No. 2 on February 2nd, 1956. [12]

Q. Mr. Wu is the gentleman who sits at my left, Mr. Milton Wu of the Bureau of Narcotics.

A. Yes, sir.

(Testimony of William J. Gowans.)

Q. Did you conduct any chemical analysis or examination of the contents of Exhibit 1?

A. I did.

Q. Can you kindly tell us what it contains?

A. It contains heroin.

Q. And do you know the approximate amount of heroin?

A. Yes, sir, I do. It contains 70 per cent heroin.

Q. Do you know the weight?

A. Oh, the weight? The weight is one ounce, 431 grains, which is just shy of two ounces.

Q. Just shy of two ounces?

A. Just short of two ounces.

Q. And that is the heroin you received on January 24th, Exhibit 1? A. That is right.

Q. Will you kindly tell us what Exhibit 2 contains?

A. Exhibit 2 contains one ounce, 36 grains of heroin.

Q. Will you kindly tell us how you conducted your analysis, just very briefly?

A. Well, I first determined that it was an opium alkaloid, and then I proceeded on to identify the opium alkaloid as heroin by microscopic and also color tests. [13]

Q. Was this soluble? Was this ready for so-called use? A. Yes, it was soluble.

Q. In each case? A. Yes, sir.

Q. Are those packets sealed? A. They are.

Q. And were they sealed in your presence?

A. Yes, sir.

(Testimony of William J. Gowans.)

Q. And have those seals been broken?

A. I broke them when I performed the analysis.

Q. You broke them yourself? A. Yes, sir.

Q. And then did you reseal them?

A. Then I resealed them.

Mr. Riordan: May I object before we proceed any further, Your Honor? As to Exhibit 1 now that it has been properly identified, I would like to object to any testimony, even for the purpose of identification at this time, to any heroin that was received by the Government in the amount—I'm sorry, what was the amount of heroin received by you on February——

The Witness: Exhibit No. 1?

Mr. Riordan: Exhibit No. 1.

Mr. Constine: That was January 23rd, Exhibit 1.

The Witness: January 24th I received it.

Mr. Constine: January 24th. [14]

The Witness: 1956.

Mr. Constine: That is Exhibit 1 for identification.

Mr. Riordan: Might I state at this time that I will object on behalf of Mr. Ong to even the identification of this amount because there is no reference at all to this particular amount of heroin involved in this indictment.

Mr. Constine: Your Honor, we intend to prove similar offenses in this case. This is only for identification, and unless we connect this up later, of course Your Honor will disregard it. But this is a conspiracy case and we cannot put in all the

(Testimony of William J. Gowans.)

evidence at one time; we have to bring it forth from the witnesses; and at the close of the Government's case then is the time to determine whether we have connected these transactions up with the defendant.

However, we are offering it at this time against the defendant Yep and the defendant Ong. There has been no testimony just who Mr. Wu purchased the narcotics from; this is for identification purposes only. There is no jury present and I am sure Your Honor will keep your mind open until the evidence is produced before Your Honor.

Mr. Riordan: I would like to make one further observation alone on this motion: that this amount of heroin was received by this gentleman now on the stand on the 24th and the acts and charges against my defendant allegedly occurred on February 1. [15]

Mr. Constine: That is not true, Your Honor. His defendant is charged with conspiracy, and the conspiracy is at a time and place to the Grand Jury unknown. Although there are overt acts listed as of February 1st, as in all conspiracy cases overt acts can be proved prior to the overt acts set forth in the indictment and subsequent to those overt acts.

The Court: The Court is prepared to rule. The objection will be overruled.

Q. (By Mr. Constine): Did you reseal these packages after you examined them? A. I did.

Q. Do your initials appear on these packages?

A. They do.

(Testimony of William J. Gowans.)

Q. And they are the packages you received from Mr. Wu? A. Yes, sir.

Mr. Riordan: May we have them?

Mr. Constine: Does counsel wish to open these packages at this time?

Mr. Riordan: No.

Mr. Constine: They are just in for identification at this time.

The Court: Let them be admitted and marked for the purpose of identification.

The Clerk: Government's Exhibits 1 and 2 for the [16] purposes of identification.

Mr. Constine: No further questions of this witness.

Mr. Riordan: No questions.

Mr. Constine: Thank you.

Mr. Ringole: Mr. Constine, will you give me a stipulation, please, that any objections made by Mr. Riordan on behalf of his client may be regarded as having been made by me too on behalf of Wee Zee Yep?

Mr. Constine: I have no objection, but I think that would be a matter for Mr. Riordan and Mr. Ringole to determine themselves what arrangements they want to make. Whatever you two gentlemen agree is perfectly all right with me.

Mr. Ringole: There is no use of my parroting Mr. Riordan.

The Court: There is nothing before the Court, gentlemen. Let's proceed.

Mr. Ringole: Do you want to give the stipulation?

Mr. Constine: I don't think I can.

The Court: Well, would you stipulate?

Mr. Riordan: I will stipulate to that, Your Honor.

Mr. Ringole: I don't see how Mr. Riordan's stipulation helps any.

The Court: Gentlemen, I call your attention to the fact that there is nothing before the Court. Let's proceed.

Mr. Constine: Mr. Wu, would you please step forward? [17]

MILTON K. WU

called as a witness on behalf of the Government; sworn.

The Court: Your name, please?

A. Milton K. Wu.

The Court: Spell it.

A. W-u. And then Milton—M-i-l-t-o-n.

The Court: And your last name?

A. Wu is my last name.

Mr. Constine: Would you please speak up, Mr. Wu?

The Court: Spell it.

A. Wu is my last name.

Mr. Constine: He spelled it; W-u, Your Honor.

The Court: I am not familiar, you know, with this Chinese lingo. I have some difficulty with it. Proceed.

(Testimony of Milton K. Wu.)

Direct Examination

Q. (By Mr. Constine): Mr. Wu, would you kindly speak up? What is your business or occupation, sir?

A. I am a Treasury Agent with the Bureau of Narcotics.

Q. And how long have you been employed in that capacity? A. The past year.

Q. And are you now assigned to the San Francisco field office of the Bureau of Narcotics?

A. Yes, I am.

Q. Mr. Wu, have you ever seen the defendant Rocky Yep before? [18] What name do you know this defendant by who sits at my right?

A. Rocky.

Q. Directing your attention to January 15, 1956, did you have an occasion to see this defendant?

A. Yes, I did.

Q. And where did you see him?

A. At the Pagoda Cocktail Lounge.

The Court: Which one?

Mr. Constine: The man identified as Rocky.

Q. Would you kindly describe his clothing, Mr. Wu?

A. That gentleman over there with the blue jacket and khaki pants, Your Honor.

Q. And you saw him at the Pagoda Bar, did you say? A. That's right.

Q. And where is that located? In what city?

A. San Francisco.

Q. In what portion of the city?

(Testimony of Milton K. Wu.)

A. Chinatown.

Q. Do you recall approximately what time of day or night it was that you saw him in the Pagoda?

A. It was in the evening, or approximately 7 o'clock or so.

Q. Did you have a conversation with him?

A. Yes, I did.

The Court: Time and place.

Mr. Constine: Pardon me, Your Honor? [19]

The Court: Time and place. Let us fix that.

Mr. Constine: I will.

Q. What time was that that you had the conversation with him? A. About 7 o'clock.

The Court: And the date?

Mr. Constine: January 15th, Your Honor.

Q. In the Pagoda Bar, is that correct?

Mr. Riordan: If it please the Court, in order that I won't have to constantly interrupt, I want to object to all the past testimony and any further testimony by Mr. Wu along this line as to his meeting with Mr. Rocky Yep and any conversation he had with Mr. Yep on behalf of my client.

Mr. Constine: It is understood you have an objection to the whole series of transactions.

Mr. Riordan: That is right. So I will not interrupt.

The Court: The objection is overruled.

Q. (By Mr. Constine): You say you had a conversation with him; is that correct, Mr. Wu?

A. Yes.

(Testimony of Milton K. Wu.)

Q. Was anyone else present besides yourself and Mr. Yep during the conversation? A. No.

Q. To the best of your recollection would you inform the Court what you said to Mr. Yep and what he said to you? [20]

A. He asked me what I was looking for, and I said, "Well, let's go up to my apartment and we can talk better up there."

So we walked to my car and proceeded up to my apartment.

Q. And where was that located, Mr. Wu?

A. At 225 Chestnut Street.

Q. And what happened there? Was anyone present besides yourself and Mr. Yep? A. No.

Q. Did you have a conversation with him in the apartment? A. Yes, I did.

Q. Would you kindly relate to the Court what you said to him and what he said to you? And will you speak up, please?

A. I asked him about the sample that I received and why it was so small, and he claimed he didn't open it to look at the quantity. And I asked him what happened to my shipment of narcotics that I was promised. He said he sold it. However, he was expecting another shipment within three weeks or so; that his connection was a white seaman working on a freighter which was due in about three weeks.

Q. On this date, January 15th?

A. That's right.

Q. I see. Go on, please.

(Testimony of Milton K. Wu.)

A. He assured me I will have first option on that shipment and he further—I questioned as to the reliability of his connection, and he assured me that he had other connections in [21] the city; that he can always purchase narcotics for me. So I ordered—I told him to get me two ounces to tide me over until the ship came in, and he agreed and said he will locate some for me.

Q. And was that the extent of your conversation for the most part? A. Yes, sir.

Q. Did you see the defendant again, Mr. Wu, on January 23rd, 1956? A. Yes, I did.

Q. And where did you see the defendant? Where do you recall you saw him at that time?

A. At the apartment, at the same place where I mentioned before.

Q. That was your apartment? A. Yes.

Mr. Riordan: May I again—it perhaps is causing confusion; when you say the defendant you are pointing to the defendant Rocky Yep?

Mr. Constine: Yes.

Q. Did you see the defendant Yep again on January 23rd?

A. Yes, at my apartment.

Q. And about what time of day or night was that, do you recall?

A. It was approximately 8:30 in the evening.

Q. And was anyone present in the apartment or in the room where you were besides yourself and Mr. Yep?

A. No, not in the immediate room.

Q. There was someone else present?

(Testimony of Milton K. Wu.)

A. Yes, there was.

Q. And who was that?

A. Another agent on duty.

Q. Was that Agent Wolski? A. Yes, it was.

Q. Is he present in the courtroom?

A. Yes, he is.

Q. And where was Mr. Wolski at that time?

A. He was in a connecting room monitoring our vocal activities.

Q. Did you have a conversation with Mr. Yep at that time? A. Yes, I did.

Q. To the best of your recollection will you kindly tell us what you said to him and what he said to you?

A. He told me that he has made arrangement to deliver me two ounces and he is ready to go, and that he expected to contact his contact approximately 9:15 or so. So he left about that hour.

Q. Did he say anything about his seaman connection or other connection at that time that you can recall now? A. On the 23rd? [23]

Q. Yes.

A. He mentioned his seaman connection is still coming in, due in any time.

Mr. Riordan: I am sorry; I am having difficulty in hearing.

Q. (By Mr. Constine): Would you speak up, Mr. Wu, please?

A. He says that he has to make other—his other connection that is locally to get the stuff.

(Testimony of Milton K. Wu.)

The Court: What stuff?

A. Narcotics, Your Honor.

Q. (By Mr. Constine): I might say that you didn't use the word "heroin," did you?

A. No; in the trade the word "stuff" means the narcotics, Your Honor.

The Court: Stuff?

A. Stuff.

Mr. Constine: Stuff.

Q. So then did he leave at that time?

A. Yes, he left.

Q. What happened next?

A. He returned approximately an hour later and he delivered me two ounces of narcotics.

Q. Did you pay him any money for it?

A. Yes, I did.

Q. And how much did you pay him? [24]

A. I paid him \$1100.

Q. And is that this defendant Rocky Yep who sits at my right? A. Yes.

Q. Those were government funds, I assume?

A. Yes.

Q. What did you do with the narcotics? Did you initial it or what did you do with it?

A. As soon as the defendant left—Yep—I—our covering agents came in and I displayed the evidence to them and we all initialled the evidence for future identification.

Q. I will show you Government's Exhibit 1 for identification. I believe we will have to open this. Well, no. Would you kindly tell us if this packet

(Testimony of Milton K. Wu.)

contains the narcotics that you received from the defendant Yep on January 23rd?

A. Yes, this is the package that I sealed myself.

Q. Did you seal that yourself? A. Yes.

Q. And are your initials on the packet?

A. Yes.

Q. Would you kindly open up the packet then, and tell us whether or not it contains the package that you received from Mr. Yep?

A. Yes, these are the two packages I received. I identify [25] them by my initials on them and that date.

Q. Would you return them to the envelope, please?

Mr. Constine: Does counsel wish to examine them?

Mr. Ringole: I want to look at this one.

Mr. Riordan: If it please Your Honor, I have already objected to all this testimony as being incompetent, irrelevant and immaterial.

The Court: There is a running objection to all of this testimony?

Mr. Riordan: Yes, but I don't know if I mentioned it before—I would like to now add the additional objection to all this testimony as being hearsay against my client.

The Court: The objection will be overruled.

Mr. Riordan: And it is understood that that objection runs to the rest of this testimony?

Mr. Constine: Yes, that is agreeable with me.

Q. Was there any further conversation about

(Testimony of Milton K. Wu.)

meetings that you might have in the future? Was there anything such as that, or was that the extent of your conversation with Mr. Yep?

A. I told him I was leaving town; that I would contact him when I get back in town again.

Q. And what did he say he would do, if anything? A. He said all right.

Q. That was January 23rd; is that correct? [26]

A. That is correct.

Q. Did you have an occasion to see the defendant Yep again on February 1st, 1956, or did you have an occasion to talk to him by telephone?

A. Yes, I did. I called the defendant Yep in the morning and told him I was back in town. So we agreed to meet at my apartment later on in that afternoon.

Q. And did he appear? A. Yes, he did.

Q. What time was that, approximately?

A. Approximately 2 o'clock in the afternoon he came up to the apartment.

Q. And would you mind telling us now just for the purposes of this trial where that apartment was located? A. At 225 Chestnut Street.

Q. How many rooms was the apartment? You might describe it to the Court.

A. This particular apartment has a living room, bedroom, bathroom and a hallway and a kitchen.

Q. Where was the so-called listening post?

A. It was adjacent to the hallway.

Q. And what is a listening post? Would you kindly inform the Court of that?

testimony of Milton K. Wu.)

. A listening post consists of master controls
are directly connected to microphones located
each room in [27] this particular apartment.

. So a person at the listening post could hear
conversations in other parts of the apartment?

. Yes, he can.

. He arrived at your apartment about 2 p.m.?

. That's correct.

. And did you have a conversation with him
at that time?

. Yes, I told him that I would like to order
another two ounces of stuff.

. And what did he say?

. He said he will go contact his friend and get

. And so what did he do then?

. So he left.

. Did you see him again that day—Mr. Yep?

. Yes, I saw him again at 4:00—about 4 o'clock
in the afternoon.

. And where did you see him, Mr. Wu?

. At the apartment.

. At 225 Chestnut Street? A. Yes.

. That was your apartment? A. Yes.

. And did he return to the apartment at 4
o'clock or did he phone you?

. He returned about 4 o'clock. [28]

. And would you kindly tell us what he said
at that time, if anything?

. We discussed about the price. He claimed
the market——

(Testimony of Milton K. Wu.)

Mr. Riordan: I am sorry, I simply don't hear any of that.

A. We discussed about the price of the narcotics. He claimed my offer was a little low; that he couldn't get it for any less than six hundred.

Q. (By Mr. Constine): Six hundred what, now?

A. \$600.

Q. For how much narcotics? Two ounces?

A. Per ounce.

Q. Per ounce? A. That's right.

Mr. Riordan: I am going to object to this, Your Honor. Again counsel is leading in his questions.

Q. (By Mr. Constine): I will say did you discuss the price? A. Yes, we discussed the price.

Q. Tell us what was said.

A. He told me that my offer, original offer, was too low; that he couldn't get anything for less than six hundred an ounce and that he couldn't find the original connection. However, he found a secondary connection who can furnish me [29] this stuff for \$600 an ounce.

Q. And what did you say to that, if anything?

A. I told him that was way out of line, I feel that it was a little expensive; to go back and talk to the man and see if he can bring the price down.

So he left, and approximately 4:30 he called me.

Q. This is Yep?

A. That's right. Approximately 4:30 he telephoned me again and told me that he couldn't do anything, that the price would have to stand. I

(Testimony of Milton K. Wu.)

told him that "since I have to leave town, I do want the stuff, go ahead and get it."

And so he said, "O.K."

Q. Did you see him again after that phone call at 4:30?

A. Approximately 5 o'clock he came back and told me he has already passed the order on; however, he won't be able to make delivery until later on that evening. So we set a meeting to meet later on that night at Compton's Restaurant about 8 o'clock, and he departed.

About 8:15 I was at Compton's Restaurant located on Van Ness and Geary. The defendant Yep came in and told me that he was still negotiating trying to get delivery to me; that he was sure he could make it later that evening, for me to wait for his call at my apartment.

Q. So where did you go?

A. So I departed and went back to the apartment. [30]

Q. This is about 8:15 that you met him at Compton's; is that what you testified?

A. That is correct.

Q. Then you and he left? A. That's right.

Q. When did you hear from him next?

A. I heard from him approximately 9:30.

Q. How did you hear from him?

A. He made a telephone call to me and he said—he assured me that he is going to make delivery within the hour and that he was waiting for a man

(Testimony of Milton K. Wu.)

to come back with the stuff now and be sure and wait for him.

Q. Did he say he had met—did he say anything else about the connection?

A. He, he said he had saw the man, that he has placed the order and he is expecting the stuff to return so he could bring it up.

Q. That was about 9:30 that you talked to him?

A. 9:30.

Q. Did you see him or hear from him again—Mr. Yep, that is?

A. I did not see Mr. Yep again until approximately 10:15 that night.

Q. And where did you see him?

A. At my apartment.

Q. Tell us what happened there. This is on February 1st? [31]

A. February 1st approximately 10:15 p.m. he returned to the apartment and delivered to me one ounce of narcotic.

Q. I will hand you Government's Exhibit 2 for identification and ask you whether you have ever seen this packet before, and how can you tell whether you did?

A. This is the package I received on 10:15 on the 1st, and I initialled and sealed it myself.

Q. Would you kindly open the package? You received that from Mr. Yep?

A. That is correct. This is the one that I received on the 1st.

Q. Is there a container in here?

(Testimony of Milton K. Wu.)

A. Yes, there is a rubber container in there that I initialled.

Q. What is this white powder?

A. That is heroin.

Q. How much did you pay—this is the packet that you have just handed me that you received from Mr. Yep on February 1st about 10:15 or 10:30 at night?

A. That's correct.

Q. How much did you pay for this particular quantity of heroin?

A. \$600 in official advanced money.

Q. Where did you and Mr. Yep go then, or what happened after you paid the money? [32]

A. He left. He said he has to return to the man, and left my apartment.

Q. He had to return to the man? A. Yes.

Q. Did he describe what man or say what man?

A. No, he didn't.

Q. Did you have occasion to see Mr. Yep again, Mr. Wu, on February 7th, 1956?

A. Yes, I did.

Q. And where did you see him?

A. At my apartment, 225 Chestnut Street.

Q. And approximately what time, if you can recall now, so we can set the place and time?

A. Approximately 11:30 in the morning.

Q. 11:30 in the morning or evening?

A. Morning.

Q. At your apartment, and that is 225 Chestnut Street?

A. That is correct.

Q. All right. Now did you have a conversation with him?

(Testimony of Milton K. Wu.)

A. Yes; we discussed about future deliveries and general topics of narcotics, and among one of the things he told me was—his friend was going to buy a Cadillac.

Q. Did he describe what kind or what year?

A. He was going to buy a 1955 Cadillac with a canary yellow bottom and a dark top—black top.

Q. And what else did he say, if anything, about this man?

A. He claims that he advised this friend against purchasing such a car because it was too flashy; that his friend was dealing and didn't have any other job and it would just call attention upon himself.

Mr. Riordan: May I again interrupt? I didn't hear that answer at all, Mr. Wu. Again you are dropping your voice down and I am away over there.

May I have the answer, please?

(Answer read.)

Mr. Riordan: May I go to the prior answer before that?

(Answer read as requested.)

Mr. Constine: Now I heard you in your answer use the word "dealing," which the reporter didn't read. Did you use the word "dealing"?

The Court: Just a moment. Dealing?

Mr. Constine: Yes; Mr. Wu used the word "dealing."

Q. How was that used?

(Testimony of Milton K. Wu.)

A. In the trade, dealing means a man who is selling narcotics.

Q. Did Mr. Yep say who was dealing?

A. He said the man who was purchasing the car was dealing.

Q. Did he say whether this was his connection or not?

A. He merely mentioned him as his friend.

Q. Prior to that what had you been talking about? [34]

A. Negotiating for purchase of additional narcotics.

Q. Did you see him again that night—Mr. Yep, that is? A. No, I didn't.

Q. On February the 7th; did he phone you or did you see him on that night?

A. Oh, yes, he called me and told me he couldn't see me until later that evening, and that would be about 7 o'clock in the evening.

Q. I see. Did you see him that evening?

A. Yes, he came up and told me that he has contacted his connection and placed my order. However, he has to wait until he heard from the man; that he left the man at a Mah Jong game.

Q. He said he left the man at a Mah Jong game? A. Yes.

Q. His connection? A. Yes.

Q. What did you and Mr. Yep do then?

A. To kill some time we went out to dinner.

Q. And where did you eat?

A. At this Gino Restaurant on Columbia.

(Testimony of Milton K. Wu.)

Q. Was that the restaurant, the Gino Restaurant?
A. Yes.

Q. And after dinner where did you go?

A. Then the defendant Yep dropped me off at the apartment [35] and the defendant Yep stated that he was going to join his connection and see if he can get my order filled.

Q. Did you hear from him again that night?

A. Yes, I did. Approximately 8:30 he called and said he hadn't made any positive connection yet but he would contact me later.

Q. Did he contact you later on that night?

A. No, not to my recollection.

Q. Was there any transaction made that night?

Mr. Riordan: I will object to that, Your Honor.
"Did he contact you again?" "No." "Was that transaction made that night?"

Mr. Constine: I will withdraw the question.

Mr. Riordan: This is an attempt on the part of counsel to either refresh or to testify for his own witness.

Mr. Constine: I stated I will withdraw the question and restate it.

Q. Did you see him again that night on the 7th?

A. Not after we returned from dinner and left.

The Court: We will take a recess now.

(Recess.)

Q. (By Mr. Constine): Mr. Wu, you just concluded testifying about the incident with Mr. Yep on February 7th. Did you see or hear from him on the next day, February 8th——

(Testimony of Milton K. Wu.)

A. Yes, about noontime on the 8th the defendant Yep [36] telephoned me.

Q. Where?

A. At the apartment, 225 Chestnut Street.

Q. Your apartment?

A. Yes, and told me he was with his connection right then and that they are trying to get the stuff to make delivery to me; that he will call me later on in the afternoon.

Q. Did you hear from him or see him again on February the 8th—Mr. Yep?

A. Yes, he called me that evening and said they haven't made any headway yet; that he will call me again next day.

Q. Now, directing your attention to February 13, 1956, did you have an occasion to either see Mr. Yep or speak to Mr. Yep, and if you did, when was the first time on that day? Give me the time and place.

A. On the 13th early in the morning the defendant Yep came to my apartment, 225 Chestnut Street, and we discussed about this long delay, he has been keeping me waiting for three or four days now and I questioned him as to his reliability of his connection, got his narcotics first, why couldn't he get me any more; he told me that he could get it for me at any time I wanted. He said he trusts his connection he is working with, the man is reliable, not only a good connection but a good friend of his; he used to be an ex-bookie, he is well off, he is loaded, is the word he used, and that he used [37]

(Testimony of Milton K. Wu.)

to work in a cannery and no one knows the man is dealing, and he is a perfectly good connection to have.

I said, "Be so good as to call him and get him on the phone and get my narcotics." He says he can't call the man because he didn't have a telephone; he would have to see the man.

Mr. Riordan: Again I am going to object vigorously and renew my objection on behalf of Ong as to the introduction of hearsay statements which are made obviously—and when you start referring to some other man I think it is quite evident that they are attempting to refer to the co-defendant here which must be Ong. There has been absolutely no proof of any conspiracy, so therefore any acts or declarations on the part of Mr. Yep which come to this Court through Mr. Wu are highly objectionable at this point as being introduced.

Mr. Constine: May it please Your Honor, this objection is running to all the testimony, as I understand it, until we put the other agents on the stand.

The Court: Unless it is connected up, it will go out. Your objection at this time will be overruled.

Mr. Ringole: I will make the same objection.

The Court: Same ruling.

Mr. Constine: Are you objecting to this in regard to Mr. Yep?

Mr. Ringole: Yes. [38]

Mr. Constine: I might state that Mr. Yep has plead not guilty to a substantive offense, and this

(Testimony of Milton K. Wu.)

would be perfectly admissible in regard to the transaction of February 1st.

Mr. Ringole: You can't conspire with yourself.

Mr. Constine: However, there is a subsequent count going to trial at this time, Your Honor, count one.

The Court: There is nothing before the Court, gentlemen. Proceed.

Q. (By Mr. Constine): This was a conversation on the morning of February 13th you have just related; is that right? A. That's correct.

Q. And as I understand you, he said he couldn't phone his connection because he didn't have a phone? A. That's correct.

Q. What happened after that? Did he leave or did you leave? Tell us what occurred.

A. Yes, he left to see what he can do. I received a phone call from him later on that evening. He told me that he couldn't—he didn't expect that he could deliver that night and I told him that I was leaving town, that "I wish you would give me a positive statement whether you could or could not get the stuff."

He was on the telephone at that time and I overheard him turn around and address——

Q. You don't know if he turned around, do you?

A. No, I don't.

Q. Just tell us what you heard during the telephone conversation.

A. I heard over the telephone he called someone by the name of Johnny, and then they spoke some-

(Testimony of Milton K. Wu.)

thing which I did not hear. And then he came back on the phone and told me, he said definitely he couldn't get anything that evening.

Q. And did you hear any—was that the extent of the telephone conversation? A. Yes.

Q. Or did you hear anything else? A. No.

Q. Directing your attention to February 17, 1956, did you have occasion to see the defendant Yep or talk to him by phone or in person?

A. Yes, on February 17th about mid morning the defendant Yep and myself was at the Modern Cafe located in Chinatown.

Mr. Riordan: What date are we referring to now?

Mr. Constine: February 17th.

Mr. Riordan: February 17th.

A. We discussed the delivery of narcotics and the defendant Yep told me that he has a shipment lined up for me; however, the man required payment in advance. I told him that I didn't do business that way; that I liked to see the merchandise before I buy it, and that under no circumstances I [40] was going to pay for something I have not seen. He told me that his other connection was willing to put up a 1955 Cadillac as collateral, was willing to sign the pink slip over as collateral for the shipment, and he can get me that particular shipment. I told him I didn't care how he made the arrangements as long as I could get the narcotics and look at it, and if I like it I will pay him cash on the line.

(Testimony of Milton K. Wu.)

So he said he was going to go back and see if he can set it up.

Q. (By Mr. Constine): Directing your attention to two days later, on February 19th, did you have an occasion to see or hear from the defendant Yep again concerning this previous conversation?

A. Yes, on the 19th the defendant Yep came up to my apartment at 225 Chestnut Street, and again I questioned the defendant Yep as to the reliability of his connection again. He told me that he is expecting a shipment in on a ship; that if that failed to arrive he still has this other deal where he had this friend putting up the Cadillac as collateral; that we can always count on that in case we missed the boat shipment.

Q. You saw the defendant Yep on February 21st, did you not? A. Yes, I did.

Mr. Constine: And I might say at this time, Your Honor, I intend to prove a transaction through Mr. Wu with Mr. Yep. We will offer this against Mr. Yep only at this time, the [41] February 21st transaction, not against Mr. Ong. However, since Mr. Yep is going to trial in count 1 of the indictment we intend to show all the transactions with him to show similarity of offenses.

Mr. Ringole: May it please Your Honor, I want to state this: I don't think the offer is quite fair. On the heroin count if he wants me to stipulate about that heroin, I shall be glad to do so, but that heroin was the subject matter of this defendant's

(Testimony of Milton K. Wu.)

trial before Judge Harris on which he was convicted.

Mr. Constine: That's right.

Mr. Ringole: Therefore it is not proper that it be used here. They are trying to pile up offense after offense; it would be trying him again, placing him in jeopardy for that other offense for which he stands convicted.

Mr. Constine: He has plead not guilty to a sale, a transfer of heroin in this case on February 1st, 1956.

Mr. Ringole: But they proved that sale, Your Honor.

Mr. Constine: And we are showing all the similar transactions to prove the guilt.

The Court: Just a moment, let's proceed in the proper way here. Give him an opportunity to object.

Mr. Constine: He has not plead guilty to it, Your Honor. He plead not guilty that he sold heroin on February 1st, so we are going to show all the transactions to show similar [42] offenses. That's all we are doing here, and that's why I am offering this particular sale against Mr. Yep only, not against Mr. Ong. I am trying to be as fair as I can to this man.

Mr. Ringole: May it please Your Honor, in order to save time I advised Your Honor that he would plead guilty to that count 1.

The Court: Is that the count dealing with the sale?

Mr. Ringole: Yes. Your Honor took that under

(Testimony of Milton K. Wu.)

submission. I will admit that he is guilty. The testimony is in on that count. It is in on that \$600 deal. That was the offense charged in count 1, and there is no need of taking up the time and going into all these other transactions.

The Court: This is a serious charge, and if it takes a month we will be patient and go along. Let's get on. There is nothing before the Court.

Mr. Constine: To save time, does counsel stipulate that on February 21, 1956——

Mr. Ringole: I won't stipulate in view of my objection. I will stipulate to the physical character of the heroin and all that, but I won't stipulate that you can introduce it in evidence because it wouldn't be fair to this man.

Q. (By Mr. Constine): Did you see Mr. Yep again on February 21, 1956?

A. Yes, I did. [43]

Mr. Ringole: That is objected to as immaterial and as far beyond this indictment, Your Honor. This indictment charges overt acts——

Mr. Constine: It was in the same month, February 1st, as the other transaction took place. This isn't six months later, Your Honor.

Mr. Ringole: The transaction with which he is charged took place on the first day of February 1956 to which he has pleaded.

Mr. Constine: If a defendant makes numerous sales of narcotics, all that is quite relevant to show that he is guilty of the offense on February the 1st.

The Court: Showing intent or what?

(Testimony of Milton K. Wu.)

Mr. Constine: To show his intent, his plan, to show a pattern of crime, similarity of offenses, schemes.

Mr. Ringole: We have admitted his guilt on February 1st of the sale of \$600.

The Court: Overruled. Let us proceed, gentlemen. Protect your record.

Q. (By Mr. Constine): Was there a transaction on February 21st involving Mr. Yep?

A. Yes, in the evening approximately 9:15 I received approximately two and a half grains from the defendant Yep as a sample.

Q. And did you see him again that night? [44]

A. Yes, sir; approximately 10:40 the defendant Yep delivered to me one pound of heroin.

Q. Did you pay him money for that?

A. At that particular time the defendant Yep was placed under arrest and the heroin was seized.

Mr. Constine: Will counsel stipulate that the heroin about which Mr. Wu has just testified has already been introduced in evidence in another case and that we need not present it here, and you will agree that that was heroin that was sold?

Mr. Ringole: Yes, provided you will stipulate that my objection will not be waived by so doing.

Mr. Constine: Oh, no, you are still objecting to the irrelevancy of the testimony.

Mr. Ringole: Yes, sure.

Q. (By Mr. Constine): And I might say on these transactions, Mr. Wu, between the transaction of January 23rd, the transaction of February the

(Testimony of Milton K. Wu.)

1st, the transaction of February 21st—are those the transactions you have testified about?

A. Yes, sir.

Q. Were there any tax stamps of any kind on any of the narcotics that you received from Mr. Yep? A. No, sir, there was not.

Q. Did you see the defendant Johnny Ong at any time prior to his arrest? [45] A. No, sir.

Mr. Constine: No further questions, Your Honor.

Mr. Ringole: No questions.

The Court: Any questions of this witness?

Mr. Riordan: Yes, Your Honor.

Cross Examination

Q. (By Mr. Riordan): Now, Mr. Wu, you have given us a very detailed description of the various acts that have occurred. Did you make notes of these matters as you went along in this work that you were doing?

A. Yes, I did; I made reports.

Q. I see. You made those reports out yourself; is that correct? A. Yes, I did.

Q. Did you also keep a notebook in which you made reports, or rather, notes on the transactions?

A. No, I didn't.

Q. Would you after a—let us take the dealings on a particular day; let us take a particular day. Let us take January 15, 1956 in which you saw the defendant Rocky Yep. You testified that there was some discussion in your apartment pertaining to procuring heroin or narcotics and that you asked

(Testimony of Milton K. Wu.)

for a sample and you said why was it so small, what happened to the shipment—you recall your testimony in relation to February 15th, is that correct?

Mr. Constine: January 15th.

Mr. Riordan: January 15th; I am sorry.

A. Yes. ..

Q. (By Mr. Riordan): Now let's take that particular day. At these various conversations and times of these conversations, would you after Mr. Yep left your apartment make notes at that time?

A. No, sir.

Q. When would you make your report on the transaction for this particular day?

A. That particular evening if the time permits, or the following morning.

Q. And would you make this in longhand or would you type it, or just how would you do it?

A. It is typed up in official reports.

Q. I know, but you would have to transcribe it, you would have to give it to someone else; is that correct?

A. It all depends; sometimes I typed up my own reports, sometimes I dictated to a clerk.

Q. Have you reviewed these reports prior to your testimony today?

A. No, sir, I have not.

Q. Have you reviewed these notes since, let us say, February 23rd of this year?

A. Outside of various pre-trial conferences with my [47] attorney, I have not.

Mr. Constine: May it please your Honor, I might

(Testimony of Milton K. Wu.)

say that the Narcotic Bureau submits a narcotic report. There is an investigative report submitted, but I can't see the relevancy of that. I have got my own report. If that is what counsel is discussing, whether I discussed the report with Mr. Wu——

Mr. Riordan: I haven't even gone into that, your Honor. Under cross-examination I think I have a right to delve into the validity of this man's memory at the present time.

The Court: Overruled.

Q. (By Mr. Riordan): When do you think was the last time you have reviewed these various reports that you made up?

A. Well, what particular manner do you mean by reviewed? Like I said——

Q. Read it over.

A. I discussed it at length with the attorney at pre-trial conferences, if you consider that a review.

Q. In order to discuss it, did you read your reports or did you merely hand them to the attorney?

A. No, I merely stated the facts to the attorney at that time.

Q. And how did you state these facts? After having read these reports?

A. No; I mean he would corroborate his report.

Q. And when was the last time this occurred?

A. We had many trial conferences within the last week.

Q. I just want the last one.

A. The last two or three days.

(Testimony of Milton K. Wu.)

Q. Last two or three days. Now you testified on the first day of February, 1956, you met Yep at Compton's, is that correct?

A. In the evening?

Q. Yes; approximately 8:15, my recollection is.

A. Yes.

Q. Is that right? A. About 8:15.

Q. Are you sure?

Mr. Constine: Excuse me. Would you kindly raise your voice, Mr. Wu?

The Witness: Your Honor, I wish to apologize to the Court for speaking so low. I worked on assignment all night last night and I guess I am dropping off a little.

The Court: Well, you are pretty husky; you will have no trouble at all. Just speak up.

The Witness: Yes, sir.

Mr. Ringole: I can't hear you, either.

Mr. Riordan: Q. Are you sure at this time it was February 1, 1956 that you saw Mr. Yep at Compton's at approximately 8:15 p.m.? [49]

A. Yes, sir.

Q. Isn't it true at that time that he made a delivery to you? A. Yes, sir.

Q. It is? A. At that time?

Q. Yes.

A. You mean at that particular time and address?

Q. Yes. A. Oh, no, sir.

Q. And was he to make a delivery to you at that time?

(Testimony of Milton K. Wu.)

A. No, sir; we were negotiating for a delivery.

Q. You had negotiated previously, is that correct, that day?

A. During the day, yes, sir.

Q. And why, as far as you know, was there a necessity for further negotiation at 8:15 at Compton's?

A. Just what he told me, that he is endeavoring to get delivery and he has talked to the man, and he is just keeping me informed of it because I kept saying I am in a hurry, I want to leave town, I don't want to wait around all day for him.

Q. At approximately 10:15 that evening Mr. Yep delivered approximately one ounce of heroin at your apartment; is that correct? [50]

A. Thereabouts, yes, sir.

Q. What was the agreed price prior to the delivery for that ounce, do you recall?

A. I made—we made counter-offers and proposals on the price, but I paid him a total of six hundred for the delivery.

Q. That isn't what I asked you. I asked you, before the delivery, before he came to your apartment had you agreed upon a price for the purchase of one ounce of heroin?

A. Offers and counter-offers.

Q. Then is it my understanding there was no agreed price for this one ounce of heroin before he walked into your apartment with the heroin?

A. There was an agreed price before he walked in.

(Testimony of Milton K. Wu.)

Q. There was? A. Uh-huh (affirmative).

Q. What was that price?

A. I offered three hundred fifty or three hundred seventy five and he came back saying it will cost me six hundred or thereabouts.

Q. And did you just let it stand at opposite ends of the pole? A. What do you mean?

Q. Well, you offered three hundred fifty, I understand; he said, "I can't get it except for \$600." Is that right? A. Yes. [51]

Q. And then he merely left, or did you come to some agreement as to what you would pay him for one ounce of heroin?

A. Oh, I see what you mean. Well, after he said he couldn't get it for that I told him he has me over a barrel, I wanted to leave town and I needed the stuff before the ship comes and I would have to take it at his price.

Q. And what was that price—\$600 you agreed?

A. I paid him a total of \$600.

Q. No, that isn't what I asked you. I said, what was your agreement? Was it \$600 for one ounce of heroin?

A. Well, I paid him a total of \$600. Is that what you are getting at?

Q. No, I mean this, Mr. Wu: Let us assume that you sell automobiles.

The Court: We are dealing with poison here; we'd better stay with it.

Q. (By Mr. Riordan): There is sometimes a difference between the prior agreement for the pur-

(Testimony of Milton K. Wu.)

chase of an object and the exact amount of currency that is exchanged for the object. Now as I understand, as you stated, you actually paid him \$600.

A. Yes.

Q. Was that the amount you agreed to purchase this one ounce of heroin from Mr. Yep for?

A. Well, no, there was offers and counter-offers and my [52] last remark to him was if that is the price he wanted, he has me over a barrel and I will have to take it.

Q. Were you then referring to the \$600?

A. At the time of counter-offers there was a lot of figures thrown around. I just told him outright, "Well, whatever it is, bring it up and I will pay for it." He has me over a barrel, I got to leave town, I need the stuff; therefore, bring it up and I will pay for it.

Q. And by that did you mean that you would pay him \$600 for this amount of heroin?

A. Whatever price that was agreed upon.

Q. I know, but only you can tell me at the present time what the price agreed upon was, and that's all I am trying to get from you, Mr. Wu.

A. Well, like I told you, we were dickering for the merchandise.

Q. I appreciate that.

A. And when he told me that my offer was too low, it must be higher than that, I told him whatever the price is I will have to take it because he has the advantage over me.

Mr. Constine: I think that is the testimony, your

(Testimony of Milton K. Wu.)

Honor. He has said it three times. It has been asked and answered.

Mr. Riordan: But then I asked him, is it true that your understanding of what the amount or the agreed amount for this one ounce of heroin was to be is \$600; is that correct? [53]

A. Well, my understanding—

The Court: Just a moment. He has testified what the fact was. The testimony shows that he paid \$600 for it. That will be sufficient for all purposes.

Now we will proceed, gentlemen.

Mr. Riordan: Very well.

Q. Let me put this question directly, then, Mr. Wu: Isn't it true that you agreed to pay \$550 for that one ounce of heroin before the delivery was made? Does that refresh your recollection at all?

A. I don't recall any agreement as to any specific price around there; like I said, we were making offers and counter-offers there.

Q. On the first day of February 1955—or 1956, rather—Mr. Wu, you stated that after the sale was made Rocky Yep left; is that correct?

A. Yes.

Q. Did he state to you just where he was going?

A. He said he has to return to the man.

Q. Just said he has to return to the man?

A. Yes.

Q. Did he state to you when he came in just where he had come from prior to making this sale?

A. Not to my recollection.

Q. On February 1, 1956 in relation to this con-

(Testimony of Milton K. Wu.)

versation and [54] meeting at your apartment around 10:15 where the heroin was delivered, were there any recordings being made of this conversation by the Government?

A. Not to my knowledge.

Q. Was there anyone else connected with the Government listening in on this conversation?

Mr. Constine: Would you state what conversation that is?

Mr. Riordan: I am referring to the conversations at your apartment at 10:15 where the heroin was sold, you testified to, on February 1, 1956.

Mr. Constine: This is the evening delivery?

Mr. Riordan: 10:15 p.m.

Q. Was anyone listening in that time as far as you know?

A. Yes, we had an agent on duty.

The Court: He had an agent on duty.

Mr. Riordan: An agent on duty.

Q. Was he merely listening or did he have some mechanical means by which he was recording this conversation?

A. I don't recall whether he recorded the conversation or not; he was listening.

Q. He was listening? A. Yes.

Q. Then I can take it, Mr. Wu, that since February 1, 1956, you have never heard any recording in relation to the events that occurred in your apartment at 10:15 on February 1, 1956; [56] is that correct? A. Not to my recollection.

Q. You have never heard any, because other-

(Testimony of Milton K. Wu.)

wise if you had heard some, then you would know that recordings would be taken, is that correct?

A. I don't recall hearing any.

Q. You don't recall hearing any. On February 7, 1956, you met with Rockey Yep, is that correct?

A. Yes.

Q. And where was your first meeting?

A. At the apartment.

Q. Approximately what time was that?

A. Late morning, around 11:30.

Q. Around 11:30? A. Yes.

Q. What was the purpose of that particular meeting?

A. I was negotiating for additional deliveries of narcotics.

Q. How much were you trying to get?

A. I ordered a couple of pieces.

Q. I am sorry.

A. I ordered a couple of pieces.

Q. How much? A. Two ounces.

Q. Two ounces. How much were you paid for those two ounces? [56]

A. We didn't exactly agree on the price at that time.

Q. Did you make an offer to him as to how much you would pay?

A. We discussed about the qualities of the previous stuff and I left it open that if the quality measures up to previous deliveries that I was willing to pay the same amount.

Q. How much was that amount to be?

(Testimony of Milton K. Wu.)

A. Well, whatever the previous transaction was.

Q. Was that \$600?

A. Depending, if the quality was as good as the first time he made deliveries, it would be a little less or a little more. In other words, the price was left open until I myself checked the narcotics to see if it was as good as the first delivery or the second delivery.

Q. Now had you purchased any narcotics from Rockey Yep prior to February 1, 1956?

A. Yes, on January 23rd.

Q. How much did you pay per ounce for that?

A. I paid him a total of \$1100.

Q. How many ounces were there?

A. Two ounces.

Q. Two ounces? A. 62 grains.

Q. That was \$550 per ounce, is that correct?

A. Approximately. [57]

Q. On February 1, 1956 you also received one ounce, is that correct?

A. One container, that's right.

Q. And at that time you paid him \$600; is that correct? A. Yes.

Q. Was the quality of narcotics you received on January 23rd the same as the quality you received on February 1st?

Mr. Constine: Well, that is if this witness can answer that question, your Honor. That might be a question for a chemist to answer; I don't know if he is qualified to. He can answer it if he knows.

(Testimony of Milton K. Wu.)

Mr. Riordan: He is the man who testified that he was testing the quality and the price——

Mr. Constine: He didn't say he did it himself.

Mr. Riordan: ——would depend upon the quality received.

The Court: What is the question? Just a moment; reframe your question.

Mr. Riordan: The question is whether the quality of the heroin received on February 1 is the same as the quality of the heroin he had received on previous occasions.

The Court: If you know, you may answer.

A. I am not qualified to make a decision on that; I am not a chemist.

Q. (By Mr. Riordan): On February 7th, 1956 you were negotiating to purchase two ounces; is that correct? [58] A. Yes.

Q. And he was asking how much for these two ounces?

A. No price was set. Again, like I said——

Q. It was agreed then that you would pay the same as you had previously paid if it was the same quality?

A. Depending on the quality.

Q. Were you to pay him the money upon the delivery of the heroin? A. Yes, I was.

Q. And there was no question raised between the two of you as to your lack of faith at that time in his delivering this heroin, was there?

A. Well, what do you mean by that?

Q. Well, you didn't doubt that he was going to

(Testimony of Milton K. Wu.)

make this delivery if a deal was made between the two of you, did you?

Mr. Constine: I don't see the relevancy of what the agent thought at that time, your Honor; it calls for an opinion and conclusion whether he doubted Yep was going to deliver——

Mr. Riordan: This is preliminary.

Mr. Constine: I will withdraw the objection.

A. Just another negotiating for a buy. I don't know what you are getting at.

Mr. Riordan: On February 7th were you asking Rockey Yep to bring you any sample of the prospective purchase? [59]

A. I don't recall asking for any samples.

Q. And did you inform him that you did not have sufficient money to make a purchase of two ounces of heroin in the sum of \$1200 or \$1100?

A. I don't recall saying that.

Q. Now Mr. Yep informed you that a friend of his was about to purchase a 1955 Cadillac; is that correct? A. That is correct.

Q. Did he say he had purchased it or he is to purchase?

A. He said his friend was considering getting one.

Q. I see. About what time in the day did this conversation occur in relation to the Cadillac?

A. In the morning.

Q. In the morning. About what time, 11 o'clock?

A. Yes, after he arrived.

Q. What time was that?

(Testimony of Milton K. Wu.)

A. Around maybe late morning or early noon.

Q. He merely said, "A friend of mine is thinking of buying a 1955 Cadillac"; is that correct?

A. Words to that effect, yes.

Q. And he described the color of the particular Cadillac; is that correct? A. Yes, he did.

Q. He didn't identify this man by name, did he?

A. No, he didn't. [60]

Q. Now on February 13th you stated that Rocky Yep telephoned a friend; is that correct—Rocky Yep telephoned a friend in your presence?

Mr. Constine: That isn't the testimony.

Mr. Riordan: I'm sorry; isn't it? I believe the testimony is on February 23rd Rocky Yep made a telephone call from your apartment.

Mr. Constine: The testimony is that he asked Mr. Yep to phone the connection but that Mr. Yep said his connection didn't have a telephone. That is the testimony.

Mr. Ringole: That is correct.

Mr. Riordan: When you asked Rocky Yep to telephone his connection and he stated that his connection did not have a telephone, were you referring at that time to his local connection that you have referred to?

A. I was saying that I have asked the defendant to make a telephone call to see if he could hasten the delivery of narcotics and he told me he had to see the man because the man did not have a telephone.

(Testimony of Milton K. Wu.)

Q. And how did he describe this man that he was to make a connection with? How did he describe him to you, if he did?

A. He told me that this connection friend of his is a man of means, he is dealing, he was an ex-bookie; however, charges were dismissed for lack of evidence, and things of that sort. [61]

Q. What are the things of that sort, please?

A. The reason that the story came out, after I questioned the reliability of his connection I had been waiting for three or four days for delivery. So he told me he trusted the man, he was a friend of his, was a man of means, used to work in a cannery, was an ex-bookie but was never convicted of it, and a man of means.

Q. Now since Mr. Ong has been indicted, Mr. Wu, have you looked into his background as to what work he has done in the past?

A. No, sir.

Q. Has anyone ever told you about any work that he has done in the past? A. No, sir.

Q. You have never discussed or seen any records in relation to what past employments Mr. Ong has had; is that correct? A. That is correct.

Mr. Constine: Are you calling for his own personal knowledge or for what he knows from the other agents regarding whether this man has a job or not? Do I understand you are calling for hearsay? If that is what it is, the witness will testify to it.

The Witness: He is asking for hearsay?

(Testimony of Milton K. Wu.)

Mr. Constine: Are you calling for his knowledge of his background? [62]

Mr. Riordan: I will let the record stand just as it is.

The Court: There is nothing before the Court. Let us proceed, gentlemen. There is nothing before the Court.

Mr. Riordan: I have nothing further.

Redirect Examination

Q. (By Mr. Constine): Mr. Wu, just one question. Counsel asked you on cross-examination about the conversation of February the 7th when Mr. Yep in your apartment, I believe, about 11:30 or so, was talking about this '55 Cadillac that his friend was purchasing. He said more than that, as I understand your testimony on direct examination; he used the word "dealing," didn't he?

A. He said this man was dealing and shouldn't buy such a flashy car.

Q. On February 13th did he say that was the same man—is that the same man he had talked to you previously about on the 7th?

A. Yes, he did.

Q. And did he refer to the February 1st connection? Isn't that your direct testimony—or the February 1st transaction when you questioned him concerning his reliability? A. Yes, he did.

Mr. Riordan: I object to this, your Honor. This is leading.

(Testimony of Milton K. Wu.)

Mr. Constine: Q. What did he say on February 13th? [63]

Mr. Ringole: He has already answered that.

Mr. Constine: They went into that and I want the record to be clear about the connection on February 1st.

Q. On February 13th did he describe his February 1st connection?

A. I questioned him as to the reliability of the man.

Q. Of what man are you talking about?

A. The man that he got the narcotics from on the 1st of February; if he could deliver on the 1st why it has taken so long to deliver it now.

Q. And what did he say about this man?

A. Then the defendant Yep told me that he trusted the man, he was a friend of his, and he described him. He is dealing; he used to work in a cannery; he is well off; no one knows he is dealing; he is cool.

Mr. Riordan: He is what?

A. Cool. In other words, no one is aware of his dealing.

Q. Did he describe a type of vehicle that he was driving? A. A Cadillac.

Q. The year? A. 1955.

Mr. Constine: No further questions.

Q. (By Mr. Riordan): My understanding on your direct examination, Mr. Wu, was that you had never seen Mr. Ong, is that correct, prior to the arrest? [64]

(Testimony of Milton K. Wu.)

A. No, I have not.

Mr. Constine: Is that all?

Mr. Riordan: Nothing further.

Mr. Constine: Thank you. For the time being you are excused.

Does your Honor wish to take the noon recess?

The Court: Shall we adjourn for lunch, or do you want to go on?

Mr. Constine: We would be happy to have lunch, your Honor.

The Court: Then we will adjourn until 2:00.

(Whereupon a recess was taken until 2 p.m. this date.) [65]

Afternoon Session, Wednesday,
April 25, 1956 at 2 P.M.

The Court: Proceed.

Mr. Constine: Mr. Hipkins, please.

BRUCE E. HIPKINS

called as a witness on behalf of the Government;
sworn.

The Court: Your full name, please?

A. Bruce E. Hipkins, H-i-p-k-i-n-s.

The Court: Your business or occupation?

A. Federal narcotic agent, sir.

The Court: How long have you been so engaged?

A. Approximately a year and a half.

The Court: Before that?

A. Five years in police work—deputy sheriff.

(Testimony of Bruce E. Hipkins.)

The Court: Where?

A. Santa Clara County.

The Court: Take the witness.

Direct Examination

Q. (By Mr. Constine): Mr. Hipkins, you are assigned to the San Francisco field office; is that correct?

A. Yes, sir.

Q. And directing your attention to the day of February 1st, 1956, did you have an occasion to see the defendant Yep who sits at my right? [66]

A. Yes, sir.

Q. And when did you first see him on that day? Where and when?

A. Approximately 2 o'clock p.m. he drove up to 225 Chestnut Street, San Francisco.

Q. And what address was that?

A. That was the apartment where Agent Wu was at.

Q. And what did you see Yep do?

A. I next saw Yep drive from 225—

Q. Did you see him enter the apartment?

A. No, I saw him drive up to it.

Q. Drive up to it? A. Yes.

Q. Then did you see him get out of his car?

A. No.

Q. And what was the next thing you saw?

A. I observed Rocky driving from the address.

Q. And how long was that after when you first saw him?

A. Approximately 15 or 20 minutes.

(Testimony of Bruce E. Hipkins.)

Q. Then you didn't keep him under constant surveillance; is that right? A. That's correct.

Q. Then you saw him leave the apartment?

A. Yes.

Q. And what did you observe then? Where did he go? [67]

A. He went directly to 83 Winfield Street.

Q. And what address is that?

A. That is the address of the defendant Johnny Ong.

Q. That is the gentleman who sits at my right?

A. Yes, sir.

Q. And what happened then? Did you see him enter?

A. Yes, I saw him enter a doorway there.

Q. Did you see him leave?

A. Yes, I saw him leave there and drive to Mason Street between the intersection of Jackson—

Q. Did you have an occasion to see the defendant Johnny Ong on that day?

A. Yes, I saw him at approximately 3:55 p.m. driving a '51 Cadillac with a dark top and light bottom.

Q. Do you know the license number?

A. CKC 040.

Q. And what happened at that time that you observed?

A. Well, at that time the defendant Yep got into the car.

(Testimony of Bruce E. Hipkins.)

Q. Well, did you see the defendant Yep, too?

A. Yes, he was parked there and he got into the car with the defendant Ong.

Mr. Riordan: If it please the Court, again as to all the testimony that has been had in the past in relation to this witness, I hereby object to the same as being incompetent, irrelevant and immaterial and as to defendant Ong being [68] hearsay.

Mr. Constine: This time, your Honor, he is testifying to what he saw the defendant Ong do. That is not hearsay.

Mr. Riordan: That goes to competency and relevancy; hearsay insofar as seeing Yep make these various trips. I object to that on the ground of the fact that there is no foundation laid as to any conspiracy being involved and presented at this particular time.

The Court: The objection will be overruled.

Q. (By Mr. Constine): Let me understand this so that it is clear. You say the defendant Yep was parked; is that where you observed him?

A. Yes.

Q. And where was he parked and in what kind of a car?

A. He was parked in his 1952 Mercury, license No. CKB 445.

Q. Where?

A. On Mason near the intersection of Jackson.

Q. About what time was this?

A. At approximately 3:55 I saw the defendant Johnny Ong drive up in his Cadillac.

(Testimony of Bruce E. Hipkins.)

Q. What happened?

A. At that time the defendant Yep got into the car with Ong and they drove around for approximately five minutes.

Q. What happened next? What did you see next?

A. I next saw the defendant Yep get out of the car and get [69] into his.

Q. And who did you follow, if either one of them?

A. I followed the defendant Ong to Chinatown where he parked his car on Washington near Waverly.

Q. Did you see the defendant Yep again on that day after the meeting at 4 o'clock on the 1st?

A. Yes, I saw the defendant Yep leaving the apartment at 225 Chestnut Street approximately 4:30 p.m.

Q. And did you follow him?

A. Yes, he went to the intersection of Francisco and Powell.

Q. And what happened?

A. He got out of the car and was lost to my view; he was covered by other agents.

Q. Then when did you see him again?

A. Approximately 5 o'clock he drove back to 225 Chestnut Street.

Q. And that was Mr. Wu's address, is that right?

A. That is correct.

Q. Did you have an occasion to see either the

(Testimony of Bruce E. Hipkins.)

defendant Yep or Ong on the evening of February the 1st? When did you see him that evening?

A. Yes, I saw the defendant Yep riding in the defendant Ong's Cadillac at the vicinity of John and Mason Street.

Mr. Ringole: Pardon me. Where is that?

A. John, J-o-h-n. That is a short street that runs between [70] Mason and Powell, one block.

Mr. Riordan: Did you say the time of that, please?

A. Approximately 7:30 p.m.

Q. (By Mr. Constine): Did you observe Mr. Ong at that time?

A. Yes, he was driving his Cadillac.

Q. And how long a time did you keep both of them in your observation, do you recall?

A. Oh, he drove around and then returned the defendant Rocky to the vicinity of John and Mason.

Q. What happened? Did the car stop?

A. The car stopped and the defendant Rocky got out.

Q. When did you next see the defendant Yep?

A. At approximately 8:30 p.m. leaving Compton's Restaurant, or driving from Compton's Restaurant, at which time he drove to the intersection of Jackson and Mason.

Q. And what happened there, would you kindly tell us?

A. He got out of his car and walked across the street and was lost to my view. I did not see him

(Testimony of Bruce E. Hipkins.)

again for approximately five minutes when he returned to his car.

Q. Did you see the defendant Ong?

A. No, I didn't see him at that time.

Q. Did you see his automobile at that time?

A. I couldn't say definitely; I saw a Cadillac of his same color and year drive away from there, but I couldn't say it was definitely him or his car.

Q. There were other agents present, though?

A. Yes.

Mr. Riordan: In view of the last statement, your Honor, I will ask that that answer be stricken from the record.

Mr. Constine: I just asked him whether he saw it and he said he couldn't be sure.

Mr. Riordan: He said, "I don't know if it was Ong's car or not; it was the same color."

Mr. Constine: That is all right with us. That is an answer, and he doesn't know.

The Court: Let the record stand. The objection will be overruled.

Q. (By Mr. Constine): What did Yep do after you saw this Cadillac drive away, whosever it was?

A. He got into his car and stayed there for a while, and back onto the street corner in just a period of an hour or a little better where he was in the car or on the street, just walking back and forth between the two. And at one time he walked across Jackson out of view and then stayed for

(Testimony of Bruce E. Hipkins.)

three or four minutes and then came back to the car.

Q. Then what was the next thing that happened? Did you see the defendant Ong again on that night?

A. Yes, I saw the defendant Ong at approximately 10 o'clock p.m. driving his '51 Cadillac.

Q. And where was that? [72]

A. He was driving it west on Jackson close to the intersection of Jackson and Mason.

Q. Is this where Yep was waiting?

A. That is correct.

Q. And where did you see Yep, would you kindly inform the Court?

A. The defendant Ong parked the automobile on Jackson right on the corner of Mason and walked across the street with a child in his arms.

Q. This is at 10 o'clock at night?

A. Yes, sir. And as he got across the street he was joined by the defendant Rocky and the two of them walked into the doorway at 1003 Jackson. They stayed in there for approximately a minute. Then the defendant Rocky came out of the doorway, got into his Mercury and drove directly to 225 Chestnut Street.

Q. That is Mr. Wu's apartment?

A. Yes, sir.

Q. And what happened next with Mr. Yep?

A. In the space of ten minutes or so I next saw the defendant Yep driving from 225 Chestnut Street back to the same corner, Jackson and Mason,

(Testimony of Bruce E. Hipkins.)

and we were slightly a little bit behind. By the time we got up close we saw the defendant Rocky and Ong there get into the Mercury and drive around for—drive around several blocks in the space of just a few minutes. [73]

Q. Then what happened?

A. Then the defendant Ong was returned to the corner there of Jackson and Mason, at which point the surveillance discontinued.

Q. Now, Mr. Hipkins, directing your attention to February 7, 1956, a few days later, did you have an occasion to see the defendant Yep?

A. Yes, approximately 11:20 I saw him—11:20 a.m. I saw the defendant Yep go to 225 Chestnut Street.

Q. Mr. Wu's? A. Right.

Q. Yes?

A. And he stayed there until approximately 12 o'clock. At that time I followed him from 225 Chestnut Street to Bay Meadows Racetrack.

Q. Did you follow him to the Bay Meadows Racetrack yourself? A. Yes.

Q. And what happened at Bay Meadows?

A. He stayed there from approximately 1 o'clock till 5—about 5:20.

Q. Did you see the defendant Ong?

A. Yes, the defendant Ong joined defendant Rocky at the racetrack.

Q. That is Rocky Yep you are referring to?

A. Yes. [74]

(Testimony of Bruce E. Hipkins.)

Q. What time did either of them leave, or did you see them leave?

A. I saw the defendant Yep leave there about 5:20 p.m.

Q. Was Ong with him at that time?

A. No, Ong was not with him at that time.

Q. Where did Yep go, if you know?

A. He went from there to 83 Winfield.

Q. Is that Mr. Ong's residence?

A. Yes, sir.

Q. Mr. Yep went to 83 Winfield?

A. Mr. Yep went to 83 Winfield.

Q. Go ahead.

A. And stayed there for a few minutes. Then he went to Chinatown area and went to this Mah Jong place at 31 Spofford Alley.

Q. Did you see him enter the Mah Jong place?

A. No, I saw him park his car in that vicinity and he was out of sight. I saw him coming out of that place.

Q. You saw him coming out of it?

A. Yes.

Q. And where did you follow him, if at all?

A. I followed from there to 225 Chestnut Street.

Q. Mr. Wu's? A. Yes.

Q. And what did you observe? [75]

A. I just observed him go to the address.

Q. Did you see him leave?

A. Yes, he left in the company of Agent Wu and went to a restaurant over on Green Street.

Q. All right.

(Testimony of Bruce E. Hipkins.)

A. Then he returned with Agent Wu to 225 Chestnut Street, and from there he went back to the Mah Jong place at 31 Spofford Alley.

Q. All right. Did you see him enter the Mah Jong place? Did you see him leave from it?

A. No, I didn't see him enter. I saw him come from it. He came from the Mah Jong place at approximately 9:15 p.m. in the company of Johnny Ong.

Q. I see.

A. They walked to Clay Street and stood by a 1955 Cadillac, black top yellow bottom, license No. 1L-23456, which was later identified as belonging to Johnny Ong.

Q. And did your surveillance end at that time?

A. It ended after the two of them walked down to the defendant Yep's Mercury.

Q. Directing your attention to February 22, 1956, Mr. Hipkins, did you have occasion to arrest the defendant Johnny Ong? A. Yes, I did.

Q. And did you arrest him alone or in the presence of [76] another agent?

A. Agent Wolski and myself.

Q. Agent Wolski is present in court; is that correct? A. Yes, he is.

Q. Would you kindly tell us where and when you arrested the defendant and what took place?

A. We arrested the defendant Johnny Ong in front of his home at approximately 4:30 a.m. on the 22nd of February.

Q. Was he walking?

(Testimony of Bruce E. Hipkins.)

A. He had just drove up in his 1955 Cadillac.

Q. I see.

A. And after the arrest while we were searching the place for narcotic contraband, during the course of the search we interrogated Johnny Ong.

Q. What did you say to him and what did he say to you? And this is in the presence of Mr. Wolski?

A. Yes, it is.

Q. All right, go on. Would you kindly repeat the conversation?

A. We accused him——

Mr. Riordan: May it please the Court, at this time I don't know if my procedure is correct, but may I interject a question, counsel?

Q. Did you have a search warrant at this time?

A. No, no search warrant. [77]

Mr. Constine: I might ask this to clear that up, Mr. Riordan.

Q. Did you have a complaint and warrant of arrest? Had a complaint been filed before the Commissioner in this case, or do you know that?

A. I am not sure.

Q. Did you tell him he was under arrest?

A. Yes.

Q. (By Mr. Riordan): You didn't have a warrant for his arrest; is that correct?

A. I don't know whether we did or not at that time.

Mr. Riordan: In view of those answers, your Honor, I will move at this time that no testimony be allowed in relation to any search or any conversations had between this witness and Mr. Ong.

(Testimony of Bruce E. Hipkins.)

Q. (By Mr. Constine): I might ask this question: Did you place the defendant Ong under arrest? Did you arrest him? A. Yes, we did.

Q. And what did you say to him at that time? How did you arrest him? What did you say to him?

A. We identified ourselves and said he was under arrest and had been implicated in the narcotic transactions with the defendant Rocky Yep.

Q. And was this the same morning or the evening that Mr. Yep was arrested? [78]

A. This was all on the same night extending into the next day. Rocky was arrested on the 21st late and this was 12:30 a.m. on the 22nd.

Q. This was Washington's Birthday; is that correct? This was February 22nd, then?

A. Yes.

Mr. Constine: That is why the Commission was not in session.

Q. Did you book him after your arrest at the County Jail? A. Yes, we did.

Q. Was he brought before the Commission on the 23rd when the Commission was in session, or do you know that of your own knowledge?

A. I don't know that.

Mr. Constine: Well, may it be admitted subject to objection and we will let the other agents link that up, your Honor?

Mr. Riordan: I will retain my objection, your Honor. I believe at the present time the evidence is sufficient that this man was under constant surveillance; that if they were to make an arrest they

(Testimony of Bruce E. Hipkins.)

had plenty of time in which to get the proper warrants.

The Court: I will allow it to remain subject to your motion to strike and over your objection.

Mr. Constine: Your Honor, we are not attempting to [79] introduce any property that was seized.

The Court: There is nothing before the Court. The Court has ruled. Proceed.

Q. (By Mr. Constine): Will you kindly repeat the conversation? Tell us what was said.

A. At that time I accused the defendant Ong of delivering a quantity of narcotics to Rocky on February 1st and it was my opinion that the night——

Q. Wait; is this what you were telling him?

A. Yes; it was my opinion that he had concealed the narcotics in the diaper of the child due to the fact that yellow stains were found on the container.

Q. This was what you had advised Mr. Ong?

A. Yes, and at this time——

Q. Go ahead.

A. At this time his wife came in and said that “I told you you would get into trouble”——

Mr. Riordan: I am going to object again, your Honor. May my objection go to all of this testimony as being incompetent, irrelevant and immaterial again and bringing in hearsay, and the conspiracy and the overt acts in relation to any conspiracy have not been established.

The Court: The objection will be overruled. He

(Testimony of Bruce E. Hipkins.)

is entitled to what occurred at that time and place, what was said, if anything. [80]

Q. (By Mr. Constine): You accused him of engaging in this narcotic transaction; is that correct? A. Yes.

Q. And the wife said to the defendant Ong in Ong's presence, "I told you you would get in trouble"?

A. "I told you you would get into trouble running around with Rocky."

Q. And what if anything did Mr. Ong say in reply to your accusation?

A. He said nothing at that time.

Q. Did he make any statement at all?

A. Nothing. He said nothing.

Q. All right. Did you have any conversation concerning his business or occupation?

A. Yes; I asked him what his occupation was and he stated that he had been unemployed for the past year. I asked him how he could explain buying the house, paying cash for the Cadillac and everything, and not working. He stated his income was derived from gambling.

Q. Did he state where he had worked in the past, do you recall?

A. I don't remember anything on those subjects.

Q. Did you examine the house? Did you search the house? A. Yes, I did.

Q. Did you find any phone in the premises?

A. No, I did not.

(Testimony of Bruce E. Hipkins.)

Q. Did you look for one? A. Yes.

Mr. Constine: I have no further questions.

Cross Examination

Q. (By Mr. Ringole): One question: Did you have a warrant to search that house?

A. No, sir.

Q. (By Mr. Constine): Did you find anything?

A. No, no contraband.

Q. (By Mr. Ringole): You had no warrant?

A. No, sir.

Q. You know, don't you——

Mr. Constine: I will object to Mr. Ringole arguing with the witness. If he wishes to ask a question he may ask the question.

Mr. Ringole: He knows the question I was going to ask him.

Mr. Constine: Well, ask any question you like, Mr. Ringole.

Mr. Ringole: That is all.

The Court: Proceed, counsel.

Cross Examination

Q. (By Mr. Riordan): You testified, Mr. Hipkins, that you saw Mr. Ong around 3:35 p.m. on February 1, 1956; is that correct? [82]

A. 3:55?

Q. 3:55. A. Yes, sir.

Q. And you saw him driving in his car; is that correct? A. Yes, sir.

Q. A 1951 Cadillac; is that correct?

A. Yes, sir.

(Testimony of Bruce E. Hipkins.)

Q. And was anyone else with Mr. Ong at that time in the automobile?

A. When he drove up, no.

Q. Yes. Now at this time you testified that Mr. Yep—Rocky Yep—got in the car with Mr. Ong and they drove around; is that correct?

A. Yes, sir.

Q. And how many blocks did they drive around?

A. I didn't count them; they were driving slowly for a period of say five minutes.

Q. Was there anyone else in the automobile at that time? A. Just the two of them.

Q. Just the two of them. Now you testified that later on that evening at approximately 10 p.m. Ong drove up and parked his car and that he walked up carrying a child; is that correct? A. Yes.

Q. To 1003 Jackson? You stated that Ong and Yep went into 1003 Jackson Street; is that correct?

A. Yes.

Q. And Mr. Yep came out a minute or two thereafter; is that right? A. Yes, sir.

Q. Then Mr. Yep drove to 1003 Jackson Street; is that correct?

A. No, he drove to 225 Chestnut.

Q. I mean Mr. Wu's apartment. And then Mr. Yep came back to 1003 Jackson Street; is that correct? A. Yes.

Q. And at that time did Mr. Ong get into Mr. Yep's automobile? A. Yes.

Q. And who was with Mr. Ong, if anyone, when he got into the automobile? A. No one.

(Testimony of Bruce E. Hipkins.)

Q. Was the child still with him?

A. No, not at this time.

Q. Was there just Mr. Yep and Mr. Ong in the automobile at that time? A. Yes.

Q. About what time was that, do you recall?

A. Approximately 10:30.

Q. Approximately 10:30. Following this ride Mr. Yep came [84] back to 1003 Jackson and Mr. Ong got out; is that correct? A. Correct.

Q. Now as they were riding around did you follow them? A. Yes.

Q. And can you recall at this time what streets they rode on in San Francisco?

A. No, I can't.

Q. Before Mr. Yep came back at 10:30 where were you located, or when he came back at 10:30 where were you sitting or watching the activities in and around 1003 Jackson?

A. On Jackson Street in the — parked in an automobile.

Q. And 1003 Jackson Street is located at Mason and Jackson in San Francisco; isn't that correct?

A. Right.

Q. And you were parked on Mason; or rather on Jackson? A. Right.

Q. Were you parked between Mason and Taylor on Jackson or between Mason and Powell on Jackson? A. Between Mason and Powell.

Q. Between Mason and Powell. So that you were down the hill from 1003 Jackson; is that right?

A. Right.

(Testimony of Bruce E. Hipkins.)

Q. And were you on the other side of Mason Street?

A. Yes, sir. On the other side of Mason?

Q. You testified you were parked on Jackson between Powell [85] and Mason, right?

A. Right.

Q. All right. And you were parked, I assume, on either the right hand side or left hand side looking towards Mason on Jackson?

A. Yes, we were parked on the north side of Jackson.

Q. On the north side. So that from where you were parked you were looking towards Mason and you were on the right hand side; is that right?

A. Right.

Q. And approximately how many car lengths back of Mason Street were you parked on Jackson?

A. Two or three.

Q. Two or three. Were there any cars parked in front of you on the same side of the street?

A. Yes, there were.

Q. Are there parking meters there on Jackson in that vicinity, if you can recall?

A. Not to my knowledge.

Q. Did I ask you if there were cars parked in front of you? A. Yes, you did.

Q. Two or three cars parked in front of you. And from where you were seated in your automobile could you observe the entrance at 1003 Jackson Street?

A. We could observe the doorway, yes. [86]

(Testimony of Bruce E. Hipkins.)

Q. You could observe the doorway. Could you observe the door itself?

A. No, just the archway.

Q. Was someone else sitting in the automobile with you? A. Yes.

Q. Let me ask you this question: After Mr. Yep drove up, was Mr. Ong waiting for him in front of 1003 Jackson Street or did Mr. Yep drive up and park?

Mr. Constine: May I ask this question: What time are you referring to?

Mr. Riordan: This is the 10:30 time.

A. We followed Yep from 225 Chestnut Street.

Q. (By Mr. Riordan): Yes.

A. And we were at a slight distance from him, we didn't remain right close. By the time we got close—we had pulled into a parking spot, and by that time, when we pulled into the parking spot and saw the car parked over on the corner the same where it was.

Q. Now you are referring to Rocky Yep's car; is that correct? A. Yes.

Mr. Constine: Mr. Yep's car or Mr. Ong's car?

A. Mr. Yep's car. And then it——

Q. (By Mr. Riordan): Was his car parked next to the curb at this time? [87]

A. He was parked next to the curb at the time I first observed him.

Q. And was it on the north curb or on the south curb? A. On the south curb.

(Testimony of Bruce E. Hipkins.)

Q. So it was on the curb opposite to the curb you were parked at?

A. Correct. And when I first observed him—I saw the car first and then I saw the two of them getting into the car.

Q. You didn't see Mr. Yep get out of the car then, did you? A. No, no.

Q. Did you get a good look at Mr. Ong at that time so that you identified him as Mr. Ong getting into the automobile?

A. Good enough to identify him, yes.

Q. How many times previously had you seen Mr. Ong previous to this meeting?

A. Twice before.

Q. Twice. Now as I understand it, the two of them got into Mr. Yep's car and drove off; is that correct? A. Correct.

Q. Did you follow them as they drove off?

A. Yes, sir.

Q. For approximately how long a time were they driving?

A. Five or ten minutes at the most.

Q. And did you keep them under observance for this full five or ten minutes? [88]

A. Not close surveillance, no.

Q. At any time did you look into this automobile while it was driving around so that you can say at this time there were only these two individuals in that automobile? A. No.

Q. Did you see anyone else get into that automobile? A. No, I did not.

(Testimony of Bruce E. Hipkins.)

Q. Did you see three people in that automobile?

A. No, sir.

Q. Were you close enough at any time if three people were sitting in that automobile you would have seen them?

A. Not necessarily.

Q. Not necessarily. Who was driving the automobile at this time?

A. The defendant Yep.

Q. And where was Mr. Ong sitting?

A. In the front seat.

Q. In the front seat; in what we commonly call the passenger seat there?

A. Yes.

Q. The front passenger seat. Was the child with Mr. Ong at that time?

A. No, not to my knowledge; not unless it was in the car ahead of time.

Q. Now they drove back to 1003 Jackson; is that correct? [89]

A. Yes.

Q. And Mr. Ong got out of the automobile; is that right?

A. Yes.

Q. Now at this time did you have a close surveillance of the activities in and about that car?

A. No, we were—all I could actually see at that time was one of them got out of the car and the defendant Rocky's Mercury drove off.

Q. I see.

A. It was far enough back I couldn't see definitely.

Q. And you only saw one person get out of the car, right?

A. Right.

Q. Now your testimony as to February 7, 1956.

(Testimony of Bruce E. Hipkins.)

You stated that you followed Mr. Yep to Bay Meadows; isn't that correct? A. Yes, sir.

Q. And he apparently arrived there around 1 p.m. and he left approximately 5:20 p.m.; is that correct? A. Correct.

Q. And you stated you saw Mr. Ong and Mr. Yep together; is that correct? A. Yes, sir.

Q. And approximately what time did you see Mr. Ong and Mr. Yep together at the track?

A. It was 2 o'clock or later before I saw the defendant Ong with Yep in the grandstand. [90]

Mr. Riordan: I have nothing further, your Honor.

Mr. Constine: That is all.

Mr. Prziborowski, please.

ELDON R. PRZIBOROWSKI

called as a witness on behalf of the Government;
sworn.

The Court: Your full name?

A. Eldon R. Prziborowski, P-r-z-i-b-o-r-o-w-s-k-i.

Q. Your business or occupation?

A. I am a narcotic agent employed with the United States Bureau of Narcotics.

Q. How long have you been so engaged?

A. Since December 17, 1951.

The Court: Take the witness.

Direct Examination

Q. (By Mr. Constine): Mr. Prziborowski, you

(Testimony of Eldon R. Prziborowski.)

are assigned to the San Francisco office, is that correct? A. Yes, sir.

Q. And directing your attention to February 1st of this year, 1956, did you have an occasion to see the defendant known as Rocky Yep who sits at my right? A. Yes, I did.

Q. When did you first see him on that day?

A. I saw him at about approximately 2 o'clock—about five minutes after 2:00 in the afternoon driving his Mercury [91] automobile to the vicinity of 225 Chestnut Street.

Q. I see. And what address was that?

A. I just said 225 Chestnut Street.

Q. And do you know where Mr. Wu was residing at that time or had an apartment?

A. Yes, I do.

Q. And where was that?

A. At 225 Chestnut Street.

Q. And what did you see Mr. Yep do, if anything?

A. I saw him drive by and go up that dead end street, and then I watched the defendant Yep drive away at about 2:25 p.m. in the afternoon.

Q. You were not in a position to see him enter the building? A. No, I was not.

Q. Did you follow him as he drove away?

A. Yes, I did.

Q. And where did he go?

A. He drove to 83 Winfield Street in San Francisco.

Q. Whose residence is that?

(Testimony of Eldon R. Prziborowski.)

A. As far as I know, it is the residence of the defendant Johnny Ong.

Q. And did you happen to see the defendant Ong on that day of February 1st?

A. Yes, I did. [92]

Q. Where was the first place that you saw him?

A. I saw him on Mason Street drive a Cadillac automobile, I believe it was a 1951 model, license No. CKC 040 at about five minutes to 4:00 in the afternoon. He drove his Cadillac automobile and parked on Mason Street right alongside of where the defendant Yep was seated in his automobile. The defendant Yep got out of his automobile and entered the Cadillac driven by the defendant Johnny Ong. They drove around—around a few blocks and the defendant Yep got out of the automobile, and I followed the defendant Johnny Ong to where he parked the Cadillac automobile on Washington Street between Grant and Waverly Place.

Q. Did you have an occasion to see Yep and Ong again on the evening of February 1st, and if you did, where did you see them and what time?

A. Yes; I saw the defendant Ong driving the same Cadillac automobile west on Jackson Street and turn north out of Powell Street, turn around the corner, and then entering this alley or street called John Street and park, oh, about a fourth of the way up the street right alongside of where the defendant Yep was already seated in his Mercury automobile.

I saw the defendant Yep get out of his Mercury

(Testimony of Eldon R. Prziborowski.)

automobile and enter the automobile driven by the defendant Johnny Ong.

Q. About what time of night was this?

A. That was between 7:00 and 7:30; approximately 7:15 or 7:20 p.m. [93]

Q. And then what happened after you saw Mr. Yep enter Mr. Ong's automobile?

A. They drove around the block and the defendant Yep got out of the Cadillac automobile driven by the defendant Johnny Ong and entered his own automobile and drove off.

Q. Who did you see next, Mr. Yep or Mr. Ong?

A. I next saw the defendant Yep driving away from the vicinity of Compton's Restaurant on Van Ness Street.

Q. Did you follow him?

A. I followed the defendant Yep to the vicinity of Jackson and Mason Street where he parked his automobile on Jackson Street on the south side of the street.

Q. And what happened there, do you know?

A. The defendant Yep got out of his automobile and walked west on Jackson Street where he was—where some other Chinese people appeared on the street, and he stayed in that vicinity for a short period of time. Then he walked across the street, across Mason Street with a Chinese I couldn't recognize. It was a Chinese similar to the defendant Ong, but I couldn't say it was Ong at that time.

Q. All right.

A. Then I went back to the automobile and I

(Testimony of Eldon R. Prziborowski.)

was seated in with Agent Hipkins. Then I next noticed the defendant Johnny Ong's automobile driving away—the Cadillac. [94]

Q. You say you noticed his automobile. Did you see the license number?

A. Yes; I was down the street, and I noticed it was parked on Mason Street near Jackson Street. Then seated from where I was in the car I couldn't see who was driving it, but I saw the automobile leave the area.

Q. And that was the same license you had seen Mr. Ong driving previously?

A. Yes; that was approximately 9:30 p.m.

Q. Was that approximately 9:30 that you saw Mr. Ong leave?

A. No; let's see. I saw the defendant Yep arrive at the area at approximately 10 minutes to 9:00. At approximately 9:15 I saw the Cadillac automobile leaving.

Q. What did Mr. Yep do? Did you keep him under surveillance?

A. Yes, I kept the defendant Yep under surveillance at all times.

Q. What did he do?

A. He waited—he waited in his automobile; he went out to the corner and stood on the street. About every 15 minutes he would get out of his automobile and then he would return to his automobile, which was parked right in front of the common entranceway of 1003, 1005, 1007 and 1009

(Testimony of Eldon R. Prziborowski.)

Jackson Street. At approximately 10 p.m. I saw the Cadillac return to the area and——

Q. Is this the same Cadillac you testified about previously? [95]

A. Yes, sir. And the defendant Ong got out of the Cadillac automobile carrying a small child in his arms, and he walked over to the entranceway of 1003-5-7-9 Jackson Street, and as he approached there the defendant Yep jumped out of his automobile and walked into the common entranceway side by side.

Q. What happened next?

A. In less than a minute's time, just a very short period of time, the defendant Yep came from this common entranceway and entered his automobile and drove off, and I followed him back to the apartment house at 225 Chestnut Street.

Q. That is where Mr. Wu was; is that correct?

A. Yes, sir.

Q. Did you see Mr. Yep leave 225 Chestnut?

A. Yes; at approximately 10:20 p.m. I followed with Agent Hipkins in our automobile and we followed the defendant Yep's automobile rather loosely, and by the time we parked on Jackson Street between Mason and Powell the defendant Yep had already gotten out of his automobile and I saw the defendant Yep with the defendant Ong return and get into the defendant Yep's automobile—into the Mercury.

Q. And where did they go, if anywhere?

A. They went west on Jackson Street and rode

(Testimony of Eldon R. Prziborowski.)

around either one or two blocks and then the Mercury automobile returned to the vicinity of Jackson and Mason Street. [96]

Q. Did anyone get out?

A. One of the occupants got out. We were, I believe, approximately a block away at the time that one of the people got out of the automobile, and the defendant—I mean the Mercury automobile drive off.

Mr. Constine: I have no further questions of this witness.

Mr. Ringole: No further questions.

Cross Examination

Q. (By Mr. Riordan): You stated approximately five minutes before you saw Mr. Yep get out of his automobile and enter Mr. Ong's automobile; is that correct? A. Yes.

Q. Did you get a good look at the inside of Mr. Ong's car?

A. What do you mean, a good look at the inside?

Q. Well, could you see clearly inside Mr. Ong's car?

A. Well, I could see clearly that there was only one person in the automobile at the time that Yep got into the automobile.

Q. Did you see any child with Mr. Ong at that time? A. No, I didn't.

Q. Were you sitting with Agent Hipkins, I believe his name is, at approximately 10:30 when

(Testimony of Eldon R. Prziborowski.)

you saw Mr. Yep drive back to 1003 Jackson Street? A. Yes, sir.

Q. Did you clearly see Mr. Ong at that time get into the [97] automobile of Mr. Yep?

A. I saw a—I saw a person that met all the physical characteristics of the defendant Johnny Ong.

Q. Had you ever seen Johnny Ong before?

A. Yes, I saw him earlier in the daytime.

Q. And this was the time when he was driving around in his automobile; is that correct?

A. Yes, sir.

Mr. Riordan: Nothing further, Your Honor.

Mr. Constine: Mr. Stenhouse, please.

JOHN A. STENHOUSE

called as a witness on behalf of the Government; sworn.

The Court: State your full name.

A. John A. Stenhouse, S-t-e-n-h-o-u-s-e.

Q. Your business or occupation?

A. Treasury agent of the United States Bureau of Narcotics.

Q. How long have you been so engaged?

A. For the past two years.

Q. What did you do before that?

A. One year before that I was deputy sheriff in Seattle, Washington; three years before that I was an acting inspector in the Long Beach Police Department, Long Beach, California.

The Court: Take the witness. [98]

(Testimony of John A. Stenhouse.)

Direct Examination

Q. (By Mr. Constine): Mr. Stenhouse, you are assigned to the San Francisco field office of the Bureau of Narcotics; is that correct?

A. Yes, sir.

Q. Directing your attention to February 1st, 1956, did you have an occasion to see the defendant Rocky Yep who sits at my right? A. Yes, sir.

Q. And where was it on that day and when did you first see him?

A. At approximately 2:05 p.m. I observed the defendant Yep to approach 225 Chestnut Street.

Q. When you say "approach," what did you actually see?

A. I saw him driving his 1952 Mercury vehicle up the hill, which is a dead end street at that location, and park same.

Q. Did you see him enter 225 Chestnut Street?

A. No, sir, I couldn't.

Q. Will you kindly describe the vehicle you were driving in, please.

A. The vehicle—I was not driving a vehicle.

Q. Well, the vehicle that you were sitting in, I should say.

A. I was seated in a 1952 Chevrolet coupe.

Q. Was there a radio in the car? [99]

A. Yes, sir, there was.

Q. Would you kindly describe the radio and tell us what it consisted of?

A. There is a—it was equipped with a two-way

(Testimony of John A. Stenhouse.)

radio; I could send and receive messages with other units of the same equipment.

Q. Was there a unit at 225 Chestnut Street?

A. Yes, sir, there was.

Q. And that is in Mr. Wu's apartment?

A. Yes, sir.

Q. At approximately 2 p.m. did you hear Mr. Wu's voice over the loudspeaking system in your car?

A. Yes, sir.

Q. Could you recognize it as Mr. Wu's voice?

A. Yes, sir.

Q. Could you hear him address anyone?

A. I heard him address a person named Rocky.

Q. Was that an instantaneous reproduction of the voice, or were you listening to a recording?

A. No, sir, that was instantaneous.

Q. In other words, as Mr. Wu talked, you heard him talk?

A. Yes, sir.

Mr. Riordan: If it please the Court, again on behalf of my client I will now object to any and all testimony that has been received already and will be received along this [100] line on the basis of fact that it is incompetent, irrelevant and immaterial as to the defendant Ong, that it is hearsay and is being improperly allowed in against Mr. Ong in view of the fact that no conspiracy has been developed.

Mr. Ringole: I make the same objection.

Mr. Constine: Those objections have been made, Your Honor, and I understand they are under submission; and we are connecting it up now, we are

(Testimony of John A. Stenhouse.)

proving the conspiracy by their acts and actions. That is what we are trying to do.

The Court: I will allow that in subject to your motion to strike and over your objection.

Mr. Riordan: I am renewing this objection with every witness. If the Court states I do not have to, that it would be considered as running to all the Government evidence——

Mr. Contine: We have already said we understand that he is objecting to all the testimony.

Mr. Riordan: To all the testimony. I see.

Mr. Ringole: That goes for my client, too.

Mr. Constine: We take a different position there. This man was——

Mr. Ringole: Then I will make the objection.

Q. (By Mr. Constine): Mr. Stenhouse, would you kindly repeat the conversation to the best of your knowledge, that you heard over your radio receiver?

A. I recall this person addressed as Rocky to state to [101] Agent Wu that he had three connections already lined up on ships and that he could supply at a later time any quantity of stuff that Agent Wu might wish to have. He further stated that he had another connection within the city that was a respectable family man.

Q. Did he describe him any more than that?

A. No, sir, not at that time.

Q. All right; go ahead.

A. That is just about all the conversation I can recall.

(Testimony of John A. Stenhouse.)

Q. Was it all in English, or was it Chinese?

A. Part of it was in—on that occasion it was all in English.

Q. Did Mr. Yep say where he was going, or did you hear any further discussion?

A. Yes. The subject they were speaking about was Agent Wu being in the market for narcotics, and after a short stay the person identified as Rocky stated that he was going to pick up now.

Mr. Riordan: May I have that last answer?

(Record read.)

Q. (By Mr. Constine): Mr. Stenhouse, you have been a narcotic agent for how long?

A. Two years.

Q. And what does the term in the parlance of the narcotic traffic "pickup" mean? [102]

A. It means that the person is going to obtain narcotics.

Q. Did you see Mr. Yep after that?

A. Yes, sir.

Q. And where did you see him?

A. He left 225 Chestnut in the previously described Mercury vehicle and drove directly to 83 Winfield Street.

Q. And whose residence was that?

A. I later learned that that was the residence of the defendant Johnny Ong.

Q. And did you see the defendant Ong on this day in question, February 1st?

A. Later I did, yes, sir.

Q. And where was that?

(Testimony of John A. Stenhouse.)

A. That was near the intersection of Mason and Jackson Streets.

Q. About what time was that?

A. Approximately 3:55 p.m.

Q. Would you kindly tell me what you observed?

A. I observed the defendant Yep to be parked at approximately 1254 Mason Street in his Mercury vehicle. At 3:55 p.m. I observed this 1951 Cadillac with California license CKC 040 to drive alongside, being driven by a person I later identified as Johnny Ong, and defendant Yep entered that vehicle.

Q. What did they do? [103]

A. They drove around the block.

Q. Do you recall how many times, at this time?

A. No, I can only recall that they went around—actually it would be four blocks, but around four turns.

Q. I see. And what happened then, so far as you know?

A. The defendant Yep left the Cadillac and entered his Mercury vehicle and then drove back to 225 Chestnut Street.

Q. Did you see the defendant enter 225 Chestnut Street? A. No, sir, I could not.

Q. Did you see him leave?

A. No, sir, I could not see him actually leave the doorway.

Q. Did you see him again any time on that day of February 1st? A. Yes, sir.

Q. And when was that?

(Testimony of John A. Stenhouse.)

A. As he left 225 Chestnut Street for the second time he drove to the area of Francisco Street and Powell Street. He left his vehicle and attempted to enter the Mambo City tavern. He could not get in there, and then went to a grocery store located across the street from there. He disappeared from my view therein for a very few minutes.

Q. Did you see him again? A. Yes.

Q. Where did he go then the next time you saw him?

A. He then entered his vehicle and again returned to 225 [104] Chestnut Street.

Q. Directing your attention to 7 o'clock on the evening of February 1st, did you have occasion to see the defendant Yep or the defendant Ong?

A. I saw defendant Yep first.

Q. Where was that?

A. At approximately 7:10 p.m. the defendant Yep left his residence, 735 Washington Street, and drove to the vicinity of 32 John Street.

Q. What happened there?

A. He parked his vehicle there, and I had a conversation with other agents in another car.

Q. I see. What happened next? Did you see the defendant Ong?

A. I saw the defendant Ong's automobile.

Q. You couldn't identify the driver at that time?

A. Not at that time, sir.

Q. Did you see the license on the automobile?

A. Yes.

(Testimony of John A. Stenhouse.)

Q. Was that the same auto you saw the defendant Ong in previously? A. Yes, sir.

Q. What happened then?

A. I observed this 1951 Cadillac to go west out of John onto Mason Street. [105]

Q. Do you know whether Mr. Yep was in the car then?

A. No, sir, as the car approached Mason and Jackson Street—I don't recall, sir.

Q. Did you see the defendant Yep or Ong again on this evening after the meeting at 7 o'clock that you saw Mr. Yep? A. Yes, sir.

Q. And where was that?

A. I next saw the defendant Yep within Compton's Restaurant at Geary and Van Ness Street at about 8:10 p.m.

Q. And who was he with?

A. He was with Agent Wu.

Q. Were they both within your view?

A. Yes, sir.

Q. And what happened after you saw them in Compton's?

A. I observed them to have a conversation for about 15 minutes, and then defendant Yep left Agent Wu.

Q. Where did he go? A. I don't know.

Q. When did you see him again?

A. I saw him within a very short time thereafter in the vicinity of Jackson and Mason Street.

Q. And what happened on that occasion?

A. I was on foot surveillance and observed de-

(Testimony of John A. Stenhouse.)

defendant Yep to approach an unidentified female accompanied by a Chinese person that I identify as Johnny Ong in front of the common [106] doorway at 1003 Jackson Street.

Q. What did you see happen then?

A. I observed the defendant Ong to drive his 1951 Cadillac from that area and he disappeared from my view.

Q. What did the defendant Yep do?

A. The defendant Yep stayed within the area until about 10:10 p.m.

Q. When you say he stayed within the area, what did you see him do in that time?

A. Well, he occasionally was out of my view, except when he would stand on the southwest corner of the intersection of Jackson and Mason, and it appeared that he was walking back and forth.

Q. And then what happened?

A. At approximately 10:10 I observed defendant Ong to return in the 1951 Cadillac, and park it on the northwest corner of Jackson and Mason Streets. He crossed the street and together, without stopping, entered the common doorway residence——

Q. When you say together—together with whom?

A. Together with defendant Yep, who also approached him simultaneously, and together they entered the common doorway at 1003 Jackson Street.

Q. And how long did either stay in there and what was the next thing you saw?

A. I observed the defendant Yep to come out in .

(Testimony of John A. Stenhouse.)

approximately [107] I would say a minute; he entered his Mercury vehicle and drove directly to 225 Chestnut Street.

Q. And what did you do then?

A. I followed him to 225 Chestnut Street and discontinued surveillance of defendant Yep at that time.

Q. You didn't follow him when he left 225?

A. No, sir.

Q. Did you go up into Mr. Wu's apartment?

A. No, sir, I met with Agent Wu.

Q. Did you initial anything?

A. Yes, sir, I did.

Q. And what was that?

A. I initialled a container that Agent Wu produced.

Q. Do you know whether this is the container that you saw on that evening? This is February 1st, isn't it?

A. Yes, sir, that is the container.

Q. Are your initials on that?

A. Yes, sir, they are.

Q. Would you kindly replace it?

And what time was this now, approximately, on February 1st?

A. That I placed my initials thereon?

Q. Yes.

A. It was after the defendant Yep had left the residence of 225 Chestnut Street and I met with Agent Wu and other agents in [108] the headquarters office.

Q. Now, Mr. Stenhouse, directing your atten-

(Testimony of John A. Stenhouse.)

tion to the day February 6, 1956, did you have an occasion to see the defendant Yep or Ong, and if you did, where did you see them, and at what time?

A. Yes, sir; I saw both defendant Yep and defendant Ong together with another unidentified Chinese person that is employed at the Union Oil Service Station, at Geary and Polk Street. The three walked to the used car Cadillac Sales Company located at Polk and O'Farrell Streets. The three met with an unidentified salesman and were looking at, for over an hour, a 1955 Cadillac with license 1-L-23456. It is ivory with a dark top.

Mr. Riordan: What date was this?

A. February 6th, about 4:30 in the evening.

Q. (By Mr. Constine): Was that the completion of your surveillance on that day?

A. Yes, sir, as near as I can recall.

Q. Directing your attention to the next day, did you have an occasion to see either Yep or Ong, and if you did, where, at what time, and which one did you see first?

A. I observed defendant Yep on February 7th at about 11:15 a.m. to again approach 225 Chestnut Street.

Mr. Riordan: May I interrupt for a moment, Your Honor? It is my understanding I must be a little more specific; that [109] my objection as to the competency, relevancy and materiality also goes to the testimony of this witness in relation to his observance of my client and two other Chinese individuals going to the Cadillac automobile.

(Testimony of John A. Stenhouse.)

Mr. Constine: So far as the relevancy is concerned, Your Honor, the relevancy of this testimony is to identify the individual from whom Yep was obtaining his narcotics. He had described him to Mr. Wu as purchasing a new '55 Cadillac, or just about to, and this agent is testifying that he saw Mr. Yep and Mr. Ong on the day before at the Cadillac lot. And in subsequent testimony we intend to prove that he saw Mr. Ong actually driving this particular 1955 Cadillac. Its relevancy is for the purpose of identifying the individual Mr. Yep was talking about.

The Court: For that limited purpose I will allow it.

Mr. Riordan: Again, Your Honor, he is going right back to the problem of hearsay which always arises in this type of testimony.

Q. (By Mr. Constine): You saw Mr. Ong on February the 6th? A. Yes, sir.

Q. What happened on February the 7th, the next day?

A. At about 11:15 a.m. I observed the defendant Yep to again approach the residence at 225 Chestnut Street.

Q. Go on. What happened?

A. I heard a conversation over the radio. [110]

Q. Where were you?

A. I was still within the government vehicle in which I was driving.

Q. Did you hear Mr. Wu's voice?

A. Yes, sir.

(Testimony of John A. Stenhouse.)

Q. Did you hear the voice of the man you had heard previously? A. Yes, sir.

Q. Did you hear him addressed by name?

A. Yes, sir.

Q. What name?

A. He again referred to the other individual as Rocky.

Q. All right. Now would you kindly, to the best of your recollection, repeat the conversation?

Mr. Constine: And I understand counsel has the same objection.

Mr. Riordan: Yes.

Mr. Ringole: And I will make the objection that it is incompetent, irrelevant and immaterial.

The Court: Let the record so show.

Mr. Riordan: May I get the date?

Mr. Constine: February 7th—at what time?
11:15 a.m.

Mr. Ringole: The indictment indicates that this conspiracy was consummated on February 1st.

Mr. Constine: It does no such thing, Your Honor. Mr. [111] Ringole is stating something that is not so. The indictment states that a time and place unknown to the Grand Jury these defendants conspired. One of the overt acts set forth happens to be February 1st.

Mr. Ringole: Will you read the indictment? You will see that the sale was on the 1st of February and you will see that the overt acts were all on the 1st of February and those that you prove

(Testimony of John A. Stenhouse.)

directly were on the 1st of February with reference to the subject matter of this conspiracy.

Mr. Constine: I might state for the record, Your Honor, so that the record is clear, that in paragraph 1 of the conspiracy count of this indictment it states "that at a time and place to the Grand Jury unknown, the defendants Yep and Ong, alias Johnny Ong, and others to the Grand Jury unknown did knowingly and willfully conspire together."

I think that is sufficient for the purposes of this objection.

The Court: The objection will be overruled. Will you proceed.

Q. (By Mr. Constine): Would you kindly to the best of your recollection repeat the conversation that you heard? And this is the same manner that you had the previous one that you testified to on February 1st?

A. Yes, sir. The part of the conversation I recall——

Q. Was it all in English? [112]

A. No; this particular conversation was at times in Chinese and at times in English.

Q. Do you understand Chinese? A. No, sir.

Q. Then would you repeat what you understood?

A. I heard the person's voice of Rocky stating that his connection was considering purchasing a new Cadillac. I further heard Rocky to state that he would like to go back to the Orient, and he spoke

(Testimony of John A. Stenhouse.)

of the living conditions over there, the rate of exchange. And that's about all I can recall, sir.

Q. What happened after this conversation? Did you see Mr. Yep leave, or did you follow him?

A. Yes, sir; the defendant Yep left this place and proceeded directly to the San Mateo racetrack.

Q. And did you see Mr. Ong?

A. Yes, sir, I did.

Q. And where did you see Mr. Ong?

A. I saw him in the F section of the uppermost stands, and he was in company with defendant Yep.

Q. Did you see either one of them leave?

A. Yes, sir, I saw defendant Yep leave.

Q. Did you see Mr. Ong leave?

A. No, sir.

Q. Did you follow Mr. Yep? [113]

A. Yes, sir. He returned immediately to 83 Winfield Street and stayed there a very short time and continued on back into the Chinatown area.

Q. This is on February 7th, is it not?

A. Yes, sir.

Q. Did you end your surveillance at that time?

A. Shortly thereafter, yes, sir.

Q. Did you see Mr. Ong that night of February 7th, the day of Bay Meadows? A. I'm not sure.

Q. Now on February 8th, 1956, the next day, did you see either Mr. Yep or Mr. Ong, and if you did, where and at what time?

A. On February 8th I observed defendant Yep leave his residence and go directly to 83 Winfield Street where he met with defendant Ong. The two

(Testimony of John A. Stenhouse.)

entered the 1955 Cadillac and disappeared from my view.

Q. What license number was that?

A. That was 1-L-23456, as near as I can recall.

Q. Was that the same car and license you had seen on the lot—the men looking at on the lot?

A. Yes, sir, it was.

Q. And did you see them again that day?

A. I didn't see them until about 3:15 in the afternoon.

Q. What were they doing and where were they? Were they [114] driving?

A. The two were seated within the Cadillac.

Q. The same car?

A. Yes, sir; at the Union Oil Service Station at Polk and Geary Streets.

Q. Directing your attention to February 21, 1956 did you have an occasion to see the defendant Rocky Yep—I should say, did you have occasion to question the defendant Rocky Yep?

A. Not on the 21st, sir.

Q. On the 22nd? A. Yes, sir.

Q. That was Washington's Birthday?

A. Yes, sir.

Q. What time and where did you see him?

A. It was shortly after midnight of the 21st, which was the 22nd. He had already been arrested and brought to headquarters office. When I first saw him he was within the headquarters office. After other agents had completed their interrogation of him, I commenced an interrogation of him.

(Testimony of John A. Stenhouse.)

Q. Do you recall whether anyone was present besides yourself and Mr. Yep?

A. There were other agents coming and going from this office. [115]

Q. Would you kindly tell us to the best of your recollection in substance what you said to him and what he said to you?

A. I asked defendant Yep some of his personal history which was necessary for a routine report, such as his background, what type of work he did; and he stated he was unemployed for the last couple of years but that he was a merchant seaman. And I asked him about his junk business.

Q. Did he say how long he had been engaged in the——

A. Yes, he stated that he had been in the narcotic traffic for the past four years.

Q. (By Mr. Riordan): Is that what you meant by junk business? A. Yes.

Q. (By Mr. Constine): What does the term “junk” mean?

A. “Junk” means anyone handling illicit narcotics, namely, heroin.

Q. Did you question him about his activities with Mr. Wu?

The Court: State what was said and done at that time and place.

A. I asked him if he was aware of all the sales he had made to federal undercover agents. He stated that he was. He was very cooperative. I asked him about some of his associates. He stated

(Testimony of John A. Stenhouse.)

in response to that question, he says, "You have me right." He says, "Can I take the rap alone without [116] involving anyone else?"

I said, "Well, how about Johnny Ong?"

He says, "Oh, he is a good family man." He says, "You got me; that's it."

Q. Was that the extent of your conversation?

A. That is all I can recall at this time.

Mr. Constine: I have no further questions.

The Court: We will take a recess.

(Recess.)

Mr. Constine: I have no further questions, Your Honor. I believe it is time for the cross examination.

Mr. Ringole: No questions, Your Honor.

Cross Examination

Q. (By Mr. Riordan): May I have your name, please? A. John A. Stenhouse.

Q. Stenhouse, is that right? A. Yes, sir.

Q. Now, Mr. Stenhouse, you testified that on the 7th day of February 1956, you saw Mr. Ong and Mr. Yep meet at the racetrack; is that correct?

A. Yes, sir, that is true.

Q. You referred to it as the San Mateo racetrack. I think that is Bay Meadows; is that correct?

A. Sir, I really don't know. All I know is someone referred to it as the San Mateo racetrack. I am not familiar, but [117] it is in that area south of here.

(Testimony of John A. Stenhouse.)

Q. Do you recall, was it thoroughbreds racing that day?

A. It was a mixed race; there was harness horses as well as quarter horses, I believe.

Q. Quarter horses. And thoroughbreds were not racing, is that correct? A. No, no.

Q. Do you recall approximately what time you saw Mr. Ong and Mr. Yep at the track?

A. I saw the defendant Yep actually to enter the track, but when I first noticed defendant Ong it must have been around 2 o'clock or so.

Q. Now, Mr. Yep left approximately at 4 o'clock; was that your testimony?

A. No, sir, I didn't testify to that.

Q. What time did he leave, can you tell me?

A. I believe he might have left around 5:10 or so; I can't—

Q. You saw Ong and Yep together at 2 o'clock; is that correct? A. Yes, sir.

Q. Did you keep Mr. Yep under your surveillance from that time at 2 o'clock until he left around 5:10?

A. Yes. He was not under constant surveillance.

Q. Did you see Mr. Yep talk to other people down there besides Mr. Ong? [118]

A. Yes.

Mr. Riordan: I have nothing further.

Mr. Constine: Mr. Albee, please.

DANIEL P. ALBEE

called as a witness on behalf of the Government;
sworn.

The Court: Your full name, please?

A. Daniel P. Albee, A-l-b-e-e.

Q. And your business or occupation?

A. I am a Cadillac salesman, Your Honor, at the Cadillac Motor Car Division on Van Ness Avenue.

Q. Here in this city?

A. In the city, yes, sir.

Direct Examination

Q. (By Mr. Constine): Have you ever seen the defendant Johnny Ong before, Mr. Albee?

A. Yes, sir, I have.

Q. And did you have an occasion to see him on February 6th of this year? A. Yes, sir.

Q. And would you kindly tell us whether he purchased an automobile from your Cadillac Motor Division? A. Yes, sir, he did.

Q. And when did he first see you about the car on February 6th? [119]

A. It was some time in the morning on February 6th.

Q. And was he alone or was he with anyone else? A. No, he was with another party.

Q. Do you know that person's name?

A. Yes, sir, I do.

Q. What is his name?

A. A man by the name of Chan, William Chan.

Q. And do you know where he works or what his business or occupation is?

(Testimony of Daniel P. Albee.)

A. Yes, he works at the Union Oil Station at the corner of Polk and Geary.

Q. And was Mr. Ong negotiating for an automobile?
A. Yes.

Q. Do you recall what kind of a car it was and what year car it was?

A. Yes, it was a 1955 Cadillac.

Q. Do you recall whether it was two-tone or one-tone?
A. No, it was a two-tone car.

Q. Did he actually purchase the car?

A. Not on February 6th, sir.

Q. He came back?

A. He came back the next day and completed the transaction. I might say that they actually purchased the car as far as I was concerned on the morning of February 6th, but there was no money taken at that time. We don't consider it a legal [120] transaction, so to speak, until the money is up.

Q. And when was that? On the 7th?

A. That occurred on the 7th, yes, sir, the next day.

Q. Do you recall when on the 7th?

A. Yes, some time after lunch.

Q. Did you see Mr. Ong at the showroom where the car was in the afternoon of the 6th?

A. No, sir, I didn't.

Q. Do you know whether he was there?

A. No, I don't.

Q. Where was your particular office?

A. Well, my particular field of activity is gen-

(Testimony of Daniel P. Albee.)

erally in our new car showroom which is up on Van Ness Avenue.

Q. So you didn't show the automobile to Mr. Ong?
A. No, I didn't.

Q. Did he consummate the purchase on the afternoon of February 7th?
A. Yes, they did.

Q. How much was the car sold for?

A. The car was sold for 3895 plus the tax and license involved.

Q. And in whose name was the car purchased?

A. The car was purchased by Johnny Ong and registered in the name of Jennie Leong or Jeong.

Q. And who is that? [121]

A. I understood it to be Mr. Ong's wife.

Q. His name was not on the car?

A. His name was not on the registration, no, sir.

Q. But he was the purchaser?

A. But he was the purchaser.

Q. And do you know what kind of a car he himself turned in on this, if any—on this transaction?

A. Yes, there was as a matter of fact, two cars turned in, I might say, one by Mr. Ong and one by Mr. Chan.

Q. On Mr. Ong's purchase?

A. On this transaction, yes, sir.

Q. Was this negotiated by check or by cash?

A. Two cars were turned in, and it is usually our policy to take one or both cars out and try to wholesale them before we complete our transaction.

Q. What actual money changed hands?

(Testimony of Daniel P. Albee.)

A. Well, there was a total of just over \$1600 in cash.

Q. Paid by whom? A. Paid by Mr. Ong.

Q. For the purchase of the '55 Cadillac?

A. For the purchase of the '55 Cadillac, yes, sir.

Mr. Constine: I have no further questions.

Mr. Ringole: No questions.

Cross Examination

Q. (By Mr. Riordan): Mr. Albee, you stated that the car was [122] finally—the sale was finally finished on the afternoon of February 7th; is that correct? A. That is correct, yes, sir.

Q. And you stated it was after lunch. Could you tell us approximately what time that was?

A. I would say—I would say close to 4 o'clock.

Q. Close to 4 o'clock?

A. Before it was finally consummated. I was occupied—I might say this: I was occupied most of the day, however, with the transaction. That had to do with the two cars that were traded. I took one out and had to get some bids on it to get the best price I could on it.

Q. You state that this particular transaction took most of the day of February 7th; is that right?

A. Yes, sir, it did.

Q. Was Mr. Ong with you most of this day?

A. No, he was not.

Q. While you were conducting this transaction?

A. No, he didn't—to the best of my recollection

(Testimony of Daniel P. Albee.)

he didn't get into the transaction on the day of the 7th until some time after lunch.

Q. At around 4 o'clock you gave the automobile to Mr. Ong; is that correct? A. That's right.

Q. And what time were the papers finally signed? Let me ask [123] this preliminarily: Were some papers signed by Mr. Ong in order to complete this transaction? A. Oh, yes.

Q. And do you know what time they were signed, please?

A. Well, the finalizing of the deal was close to midafternoon, I would say, on the 7th.

Q. Thank you. Now you stated that Mr. Ong came in on the 7th of February shortly after lunch; is that correct?

A. Well, I wouldn't state the exact time, but I am quite sure it was after lunch, yes, sir.

Q. Was it fairly close to 1 o'clock or 1:30?

A. Perhaps a little later than that.

Q. Would you say 2 o'clock?

A. Maybe 2 o'clock would be closer to it.

Q. Then the transaction was finally finished around 4 o'clock; is that correct? A. Yes.

Q. Was Mr. Ong with you most of this time or did you see him in between these hours?

A. As I say, of course it must have been around 2 or 2:30; and then it took us about an hour to complete the transaction, I would say.

The Court: Is that all?

Mr. Riordan: No, I have more, Your Honor, but I don't want to proceed without counsel. [124]

(Testimony of Daniel P. Albee.)

Mr. Constine: That is all right.

The Court: Oh, we can get along without him.
Proceed.

Mr. Riordan: Mr. Albee, I will hand you—just a moment; let me have it identified. I will ask that this document be marked for identification, please.

The Court: Let it be admitted and marked for identification.

The Clerk: Defendant's Exhibit A marked for identification.

(Whereupon bill of sale referred to above was marked Defendant's Exhibit A for identification.)

Mr. Riordan: Mr. Albee, I hand you what has been marked as Defendant's Exhibit A for identification and ask you if you recognize that particular document. A. Yes, I do.

Q. And just what is it, please?

A. Well, this is our itemized bill of sale that we render in every case on a new or used car transaction.

Q. Does it show the name of the purchaser on that particular slip?

A. It doesn't show the name of the purchaser, but it does show the name of the person to whom it was registered.

Q. And to whose name is it registered?

A. Dennis Young.

Q. And the address here, please? [125]

A. 83 Winfield Street, San Francisco.

(Testimony of Daniel P. Albee.)

Q. And the date February 7th, 1956 is on that document? A. Yes, sir.

Q. Is that correct?

A. That is correct, sir.

Q. Does that document there properly reflect the transaction in which a 1955 automobile was sold to Mr. Ong on February 7, 1956?

A. That is correct.

Q. It shows that the price of the used car together with the sales tax totals \$4031.32; is that correct?

A. With the sales tax, yes, sir, but there is a license fee to add to this figure to bring it to the total.

Q. Right under that it shows that a Cadillac coupe DeDille year '51 and then behind that the number \$1400. What does that represent, please?

A. That represents one of the cars that was traded in. That was the allowance that we gave to the car.

Q. So that from the total price of \$4031.32 that is shown in the first column you deduct the allowance for the car of \$1400, is that correct?

A. That is correct, yes, sir.

Q. And it states then, "Cash difference \$2631.32"; is that correct?

A. That's right. [126]

Q. And then it has a notation, "License and/or title \$55"? A. That is correct.

Q. After adding the last two sums referred to, there is a total of \$2,686.32; is that correct?

(Testimony of Daniel P. Albee.)

A. That's right, sir.

Q. Then you have an item there that says \$1603.22; is that correct? A. That's right.

Q. And then you have an item that says, "Cash \$1085.10"? A. That's right.

Q. Is that correct? A. That's correct.

Q. And the two of them total \$2688.32?

A. That's right.

Q. Is that right? A. That's right, sir.

Q. Now isn't it true, Mr. Albee, that this item here which is opposite the word "cash" on this particular slip of \$1085.10 is the amount that was credited to Mr. Ong's account purchasing this automobile by reason of his turning in a 1953 Cadillac?

A. That's correct.

Q. And do you know to whom that 1953 Cadillac was—who owned that '53 Cadillac that was turned in? A. Who owned it? [127]

Q. Yes. A. Johnny Ong.

Q. No, I am talking about the '53 Cadillac now, Mr. Albee, for which the \$1085.10——

A. Well, this—this car was turned in by—this was either Bill Chan's car or it was Johnny Ong's car, I don't know which. There were one of each of their cars.

Q. That car that is reflected by the one thousand sum there is not the 1951 Cadillac, was it, because this \$1400 refers to the 1951 Cadillac?

A. To the '51 Cadillac, yes, that is correct.

Q. Now, isn't it true, Mr. Albee, that Mr. Chan

(Testimony of Daniel P. Albee.)

had an automobile that he allowed Mr. Ong to turn in to aid Mr. Ong in purchasing his '55 Cadillac?

A. Yes.

Mr. Constine: I will object to that as to whether it is to aid him. The purpose for which the other man put up his Cadillac to aid him in the purchase——

The Court: The facts will have to speak for themselves.

Mr. Riordan: To aid in the purchase.

The Court: The facts will have to speak for themselves.

Mr. Constine: I will object to the word "aid", Your Honor.

Q. (By Mr. Riordan): Do you recall, Mr. Albee, the conversation between yourself, Mr. Ong and Mr. Chan in which Mr. Chan [128] said, "I will turn in my automobile; you will credit—you will sell my automobile and pay off from the proceeds of the sale an obligation that I have with a credit company."?

A. That was my understanding, yes, sir.

Q. And that whatever amount was left over; that is, from the amount realized from the sale and the amount paid to the credit agency, that the same was to be credited to Mr. Ong; do you recall that?

A. I don't recall that in so many words, but I knew that that was the understanding, yes, sir.

Q. Now, Mr. Albee, Mr. Ong gave you \$1600 which was the final amount of cash to be paid on this automobile; didn't you testify to that fact?

(Testimony of Daniel P. Albee.)

A. Mr. Ong did, yes, sir.

Q. Do you recall when he was to pay you the money that he did not quite have the \$1600?

A. That's correct; he didn't.

Q. How much did he have, do you recall?

A. He had approximately—I believe it was fourteen hundred exactly.

Q. And did he subsequently get the additional \$200? A. Yes, he did.

Q. And can you tell us how he got that \$200?

A. Yes; Bill Chan said, "I think I have that much money at the station." [129]

Q. I see.

A. So he left the little closing office we were in, was gone a few moments and returned with the money.

Q. Fine. And that is the additional \$200?

A. Yes.

Q. So that with the \$1400 that Mr. Ong had and the \$200 that Mr. Chan had, the total sum of \$1600 was given to you; is that correct?

A. That's correct.

Q. And Mr. Chan is the boy who runs a gas station on Polk and Geary; isn't that correct?

A. Yes.

Q. And that gas station is approximately half a block at the most from the Cadillac agency, isn't it?

A. It is right adjacent to our place of business.

Mr. Riordan: That's right. I have nothing further, Your Honor.

In view of the foregoing—

(Testimony of Daniel P. Albee.)

Mr. Constine: I would like to ask a question——

Mr. Riordan: May I offer that document in evidence, Your Honor?

The Court: Let it be admitted and marked next in order.

The Clerk: Defendant's Exhibit A admitted in evidence.

(Whereupon Defendant's Exhibit A heretofore marked for identification was received in evidence.) [130]

Redirect Examination

Q. (By Mr. Constine): Just one question, Mr. Albee. About the times in question, you heard the agent testify that on the afternoon of February 7——

Mr. Riordan: I am going to object to this question now, Your Honor.

Mr. Constine: No; it is redirect, Your Honor——

Mr. Riordan: I am going to object to this question, Your Honor. This man is the government's witness.

The Court: Just one moment. Allow him to ask the question.

Q. (By Mr. Constine): Mr. Albee, you heard the agents during the afternoon of February 7th testify that Mr. Ong was observed at the Bay Meadows Racetrack; is that correct? A. Yes.

Q. And you say that to the best of your recol-

(Testimony of Daniel P. Albee.)

lection during the afternoon he was present at the Cadillac agency.

Mr. Riordan: Now——

Mr. Constine: Let me finish my question. I'm not finished yet.

Q. Now do you base that time, or are you sure of the various times involved, or is it your best recollection it was the afternoon?

A. Well, my best recollection it was in the afternoon and it was around about the time that I specified. It must have [131] been right around 4 o'clock.

Q. Well now, you say——

A. Somewhere between 2 and 4.

Mr. Riordan: Just a moment, Your Honor. May I interpose an objection?

Q. (By Mr. Constine): Somewhere between 2 and 4?

A. Yes.

Mr. Riordan: At this time my objection would be that this witness is the government witness. He is in effect attempting to impeach this particular man——

Mr. Constine: Oh, no.

Mr. Riordan: ——by prior statements of the government's own witnesses.

Mr. Constine: Your Honor, I am trying to find out——

The Court: He has a right to develop the facts, whatever they may be. Let the record stand.

Mr. Constine: His testimony was that he saw him some time between 2 and 4 o'clock. That is his testimony. Thank you, Mr. Albee.

Mr. Wolski, please.

CHESTER J. WOLSKI

called as a witness on behalf of the Government;
sworn.

The Court: Your full name, please?

A. Chester J. Wolski. [132]

Q. How do you spell your last name?

A. W-o-l-s-k-i.

Q. What is your occupation?

A. I am a Treasury agent with the United States Bureau of Narcotics.

Q. How long have you been so engaged?

A. The last two years.

Q. Prior to that time what was your business?

A. I was four years as an internal revenue agent.

The Court: Take the witness.

Direct Examination

Q. (By Mr. Constine): Mr. Wolski, you are assigned to the San Francisco field office of the Bureau of Narcotics? A. Yes, I am.

Q. And directing your attention to January 23rd of this year, 1956, did you have an occasion to see the defendant Yep, Rocky Yep, who sits at my right? A. Yes, I did.

Q. And where did you see him, and about what time, if you can recall at this time?

A. At approximately 8:30 p.m. I'd observed the defendant Rocky driving up in a 1952 Mercury at the entrance of 225 Chestnut Street.

(Testimony of Chester J. Wolski.)

Q. Tell us what you observed and what happened.

A. I saw the defendant Rocky enter. In about a minute I [133] followed and joined another agent at a listening post so that we would be able to monitor the conversation that took place between the defendant Rocky and Agent Wu.

Q. This listening post — you might advise the Court, is this some type of radio apparatus or just what is it?

A. Well, it is an electronic device where you can hear the conversation in adjoining rooms.

Q. Do you hear a recording of the conversation or do you hear the conversation as it takes place at the time it takes place?

A. It is direct conversation.

Q. Just like speaking in a microphone and you have the speaker; is that right?

A. That is correct.

Q. Who was present besides Agent Wu and the defendant Rocky Yep?

A. They were the only two in the apartment.

Q. And did you overhear a conversation between the two? A. Yes, I did.

Q. To the best of your recollection would you kindly advise the Court what Mr. Yep said to Mr. Wu and what Mr. Wu said to Mr. Yep?

Mr. Ringole: That is objected to as incompetent with respect to the allegations of this indictment.

The Court: The objection will be overruled. He may [134] answer.

(Testimony of Chester J. Wolski.)

A. The conversation at the beginning was relative to ordering or narcotics.

The Court: What was said, as near as you can remember, between them at that time and place?

Q. (By Mr. Constine): In substance, tell us to the best of your recollection what was said, Mr. Wolski.

A. The conversation was relative to the ordering—

The Court: That is a conclusion. You will have to state as near as you can what was said.

A. Excuse me, Your Honor. Agent Wu asked him if he could make a delivery for him tonight; Rocky returned that he believed that he could. The conversation went along where Rocky had spoke he had a Caucasian seaman as one of his connections. Agent Wu returned and said, "How is it that you trust a white man?"

He said, "I have been dealing with him for years."

So Agent Wu then asked Yep, he says, "Well, could you do me any good now to tide you over until your seaman connection got into port?"

So the defendant Rocky said yes, that he could; that he had other connections in the city. So he says, "All right," he says, "fine." He says, "Could you get me two ounces?"

Mr. Riordan: May I interrupt for just a moment? What date is this, please? [135]

The Witness: January 23rd.

A. He says, "Why don't you make him a quick

(Testimony of Chester J. Wolski.)

call and we will make a deal." Thereupon Rocky says, "No, I can't call him; I have to go there."

Q. I see.

A. So after that he left the apartment at approximately 9:30 and I again went out in the street and placed the doorway under surveillance again. At approximately 10:20 the defendant Rocky reappeared in his 1953 Mercury, parked again in front of 225 Chestnut, again entered. I followed him and was able to hear the conversation relative to the delivery of the two ounces and the payment for the same by Agent Wu.

Q. Directing your attention to February 1st, 1956, Mr. Wolski, were you on duty that day with other agents surveiling Mr. Yep and Mr. Ong?

A. Yes, I was.

Q. And what time did you commence your particular surveillance that day?

A. Approximately 7 p.m. that evening.

Q. You didn't see either the defendant Yep or the defendant Ong during the day of February the 1st?

A. No, I did not.

Q. When was the first time you saw either Mr. Yep or Mr. Ong and where did you see them?

A. I was with Agent Stenhouse in the government vehicle and [136] we observed the defendant Ong drive a Cadillac coming from John Alley onto Mason and drive away.

Q. You didn't see Yep at that time?

A. No, I did not at that time.

Q. I see.

(Testimony of Chester J. Wolski.)

A. Then later on we picked up on defendant Yep and we followed him around Chinatown to the area of Pacific and Grant where he parked the car for a time, and then we waited for his return and followed him—momentarily lost him and followed him, or rather saw him at Compton's Restaurant at the corner of Geary and Van Ness. Agent Stenhouse went in the restaurant while I parked the vehicle so we would be ready to follow the defendant Yep as he left.

Q. Go on. What happened?

A. And approximately 10 or 15 minutes they were there. I observed the defendant Yep come out to the street and in a few seconds followed by Agent Wu. So I drove up to Agent Wu and asked him what was going on.

Q. Well, I don't think we are permitted to go into those conversations. So anyway you had a conversation with Agent Wu; is that right?

A. Yes.

Q. And then what—

A. Then we continued following the defendant Yep down to the Chinatown area. Again momentarily we had lost view of [137] him, but we did see him parking the car at the vicinity of Mason and Jackson.

Mr. Riordan: You say "we". Who are you referring to now?

A. Agent Stenhouse and myself in the government vehicle.

Q. (By Mr. Constine): What did you see? Tell

(Testimony of Chester J. Wolski.)

me what you observed after you saw Mr. Yep park.

A. I saw him meet an unidentified Chinese male who was later identified as Johnny Ong. They had a conversation and defendant Johnny Ong drove off.

Q. In what? Do you know what he drove off in?

A. He drove off in a '51 Cadillac, license number CKC-040.

Q. And did you see the license at that time?

A. Yes, I did.

Q. And what did you observe Yep do after that?

A. Yep meantime was in and out of this car apparently waiting for someone.

Q. Well, go ahead.

A. And during that time he was in and out of the car walking around the streets. Approximately at 9:30 I had occasion to go over to the drugstore to purchase a pack of cigarettes. As I left the drugstore I observed that the defendant Yep was walking across directly from me on Mason Street and he entered the drugstore. So I stopped and put the doorway under surveillance on the opposite of the street. He was [138] in there approximately five minutes. He again returned out to the street and again waited in and out of the car.

Q. What eventually happened, then?

A. Approximately 10 o'clock I again observed this Cadillac, the same license, and the defendant Johnny Ong parked on the north side of Jackson facing west, and I saw Johnny Ong get out of a car with a child in his arms, and he crossed directly

(Testimony of Chester J. Wolski.)

across the street where he was joined by defendant Yep, and they both entered the common doorway of 1003 Jackson Street.

In approximately a minute's time I again observed the defendant Yep return to his car, a 1952 Mercury, and drive directly to 225 Chestnut Street.

Q. All right. What happened at Chestnut Street? Did you keep Yep under surveillance?

A. No; we had a little vehicle trouble so we had to discontinue surveillance.

Q. You didn't follow Yep?

Mr. Riordan: You had a little what?

A. Vehicle trouble, so we discontinued surveillance.

Q. (By Mr. Constine): You didn't follow Yep back to Jackson Street? A. No, I didn't.

Q. Directing your attention to February 7th, 1956, if you recall that date, two days later, did you have an occasion to see the defendant Yep again and where? [139]

A. Yes, I did. I was stationed at the listening post again.

Q. Is this at 225 Chestnut?

A. At 225 Chestnut. This is approximately 11:30 a.m.

Q. Tell us what occurred.

A. I heard a conversation between Agent Wu and the defendant Yep.

Q. To the best of your recollection would you inform Judge Roche what you heard in substance?

(Testimony of Chester J. Wolski.)

A. The conversation with defendant Yep was hinging around——

Q. Well, what did he say?

A. His connection was interested in buying a new '55 Cadillac, or a '55 Cadillac.

The Court: That may go out. You will have to say as near as you can what was said and who said it.

Q. (By Mr. Constine): What did he say?

A. He said that his connection——

The Court: Who said it?

A. This was defendant Yep stated that his connection was purchasing a 1955 Cadillac.

Mr. Riordan: In view of the fact, Your Honor, that it is merely repeating the same words and the same substance, I will move that it be stricken.

The Court: I will allow the record to stand.

Q. (By Mr. Constine): Is that what you heard——

A. That's right. [140]

Q. ——Mr. Yep say?

A. Mr. Yep said that his connection was intending to buy a 1955 Cadillac.

Q. What else did he say?

A. And that he had strongly advised him not to.

Q. Advised who?

A. Not to buy the Cadillac, that he, his friend, the connection was unemployed and had no source of income and the Cadillac would draw a lot of attention and explanation, so he strongly had advised him not to buy the Cadillac. Then he continued, Defendant Yep, that when he was dealing he always

(Testimony of Chester J. Wolski.)

had on old clothes, didn't dress sharply at all to not draw any attention.

Q. Did you have occasion to overhear another conversation on February 7th, 1956 between Yep and Agent WU, and if you did, where did you hear the conversation? Or perhaps you didn't. Was that the only conversation?

A. No, that was the only conversation on the 7th.

Q. Directing your attention to February 22nd, the early morning of Washington's Birthday, did you have an occasion to see the defendant Johnny Ong?

A. Yes, I did. Agent Hipkins and myself had placed the residence 83 Winfield Street in this city under surveillance awaiting the return of the defendant Johnny Ong.

Q. Was this after the arrest of Yep? [141]

A. Yes, this was.

Q. All right.

A. At approximately 4:30 a.m. of the morning of February 22nd, 1956 we observed Johnny Ong parking his Cadillac in front of his garage doorway at 83 Winfield Street. So we immediately went over there and I identified myself and I told him he was implicated in narcotics.

Q. When you say you identified yourself, what did you say?

A. I showed him my commission and told him I was a Treasury agent.

Q. Did you put him under arrest?

(Testimony of Chester J. Wolski.)

A. I put him under arrest by saying he was implicated in a narcotics transaction. So I then asked him if it would be all right to search the premises. So later on we did that, and throughout the search we had an interrogation going and we——

Q. When you say “we”, who are you referring to?

A. There were Agents Hipkins and another agent who were there searching the premises for contraband narcotics.

Q. And yourself?

A. Besides myself. So I confronted him that he had been observed by the numerous agents in the company of defendant Yep.

Q. Did you refer to any night?

A. I specifically referred to the night of February 1st; [142] that he was seen with this child driving up in a Cadillac, he and defendant Yep going in the doorway; ultimately the defendant Yep had delivered the narcotics directly to our agent, to which he remained silent and gave me no answer.

In the meantime, his wife retorted, “I told you you would get yourself in trouble by fooling around with Rocky.” To this again he gave me no answer, he remained silent.

Q. Did he talk to you at all about his business or occupation?

A. Later on in interrogation — our search revealed that he had expensive clothing——

Q. Well, what did you say to him?

A. So I asked him, I said, “What is your source

(Testimony of Chester J. Wolski.)

of income for all this?" And I asked him what he had for a job. He said, "Well, I am unemployed."

Q. Did he say for how long he had been unemployed?

A. He told me he was unemployed for a year—for at least a year; prior to that he had been employed in a can company or cannery company. So I asked him what the source of income was for this, and he told me he was a gambler.

Q. Did you make any search or examination to determine whether he had a telephone?

A. Yes, I did.

Q. Did he have a telephone?

A. No, he didn't. [143]

Mr. Constine: I have no further questions of this witness.

Cross Examination

Q. (By Mr. Riordan): Did you have a warrant for this defendant's arrest?

A. This being a holiday, no, I didn't, sir.

Q. You did not have; is that correct?

A. No, I did not.

Q. You had him under surveillance from 5 o'clock or 7 o'clock the previous evening?

A. I did.

Mr. Constine: Your Honor, I might say this: I am going to object to this line of questioning on this ground: The relevancy of a warrant would be in the event they had obtained something there by their search, found narcotics, and we were attempt-

(Testimony of Chester J. Wolski.)

ing to introduce that into evidence without the necessity of a warrant or complaint. However, nothing was found and we are introducing no physical evidence at this time.

I think the Court can take judicial notice of the fact that February 22nd was a holiday and that complaints are on file in this court on February 23rd in which the defendants appeared before the U. S. Commissioner at that time, the day after the holiday.

Mr. Riordan: The Government would like to have their [144] cake and eat it, too, Your Honor.

Mr. Constine: We are not interested——

Mr. Riordan: And subsequent to the question as to the arrest and notification of the arrest, there was conversation had and questions asked and a search made of the premises. Now I think it is essential to the proper presentation of this case that at least I be allowed to lay the foundation by asking the man if he had a search warrant.

Mr. Constine: Your Honor, the relevancy of the admissions is based on whether they were taken by force or by duress or whether this defendant was threatened or beaten up. That is the type of question that would go to the admissibility of the admission, and not the question of whether there was an arrest warrant.

The Court: I shall allow any conversation had at that time and place in relation to the arrest, and I will give you an opportunity at the proper time to discuss the law of the case.

(Testimony of Chester J. Wolski.)

Mr. Riordan: Can I proceed with this line of questioning, Your Honor?

The Court: Proceed.

Q. (By Mr. Riordan): Did you have a warrant for Mr. Ong's arrest? A. No, I did not.

Q. And did you have a search warrant for his home? [145]

A. I didn't have no search warrant.

Q. You stated that you went into a drugstore at approximately 9:20; is that correct?

A. That's right, sir.

Q. On the evening of February 1, 1956, wasn't it?

A. That is correct, February 1st, 1956.

Q. And at the same time you saw Mr. Yep enter a drugstore; is that correct?

A. I had just purchased some cigarettes and I had gone across the street and I noticed that the defendant Yep was coming towards the drugstore.

Q. And he went into this drugstore?

A. Yes.

Q. Was that the same drugstore which you had entered? A. Yes, sir.

Q. And he stayed in there for about ten minutes; is that correct? A. About five minutes.

Q. Five minutes. And for approximately an hour between 9 p.m. and 10 p.m., roughly, Mr. Yep was in and out of his car, is that correct?

A. That is correct.

Q. In and about the vicinity of Jackson and Mason Street; is that correct?

(Testimony of Chester J. Wolski.)

A. That is correct. [146]

Q. And you did not keep your eyes upon him constantly from approximately 9 until 10 p.m., did you?

A. Except for that incident buying those cigarettes and noticing him going into the drugstore.

Q. And when he was in the drugstore?

A. That is correct.

Mr. Riordan: Thank you very much.

Mr. Ringole: May I have just a question tomorrow morning unless Your Honor wants to continue?

The Court: Is that all from this witness?

Mr. Ringole: I just want to have one or two questions.

Mr. Constine: This is our last witness, so I would suggest that this examination be completed, Your Honor, this afternoon.

Mr. Ringole: I just want to ask him a question.

Q. You saw him go into the drugstore?

A. Yes, I did.

Q. You saw him stay in the drugstore five minutes, didn't you? A. Yes, sir.

Q. For all you know as you sit there now—for all you know, he may have gotten the heroin in that drugstore.

Mr. Constine: I will object to that question as argumentative, Your Honor, and not a proper question of this witness. "For all you know." [147]

The Court: The objection will be sustained.

Q. (By Mr. Ringole): Will you swear that he didn't get heroin in that drugstore?

(Testimony of Chester J. Wolski.)

Mr. Constine: Object to that question as argumentative.

Mr. Ringole: It is not argumentative, Your Honor.

Mr. Constine: How can this witness swear to anything concerning what Mr. Yep did?

Mr. Ringole: You are making the point that because they were seeing each other that they were getting the heroin from each other. Now he could have gotten heroin in this drugstore.

Mr. Constine: Your Honor, if Mr. Ringole wishes to call for the agent's opinion, I have no objection to his——

Mr. Ringole: I am not asking him for any opinion.

The Court: There is nothing before the Court.

Mr. Constine: I will object to the question as an improper question.

The Court: Objection sustained.

Q. (By Mr. Ringole): Was there opportunity for him—that is, Yep—to have gotten the heroin in that drugstore?

Mr. Constine: Calling for the opinion and conclusion of the witness, Your Honor.

The Court: Sustained.

Mr. Ringole: All right.

Mr. Constine: I have no further questions. [148]

The Court: Step down.

(Witness excused.)

Mr. Constine: At this time, Your Honor, the Government will offer into evidence Exhibit 1 and Exhibit 2 as against each defendant in this case.

The Court: Let them be admitted and marked.

The Clerk: Government's Exhibits 1 and 2 heretofore marked for identification now in evidence.

(Whereupon U. S. exhibits Nos. 1 and 2 heretofore marked for identification were received in evidence.)

Mr. Constine: We will offer all the evidence that has been elicited during this trial testimony against each defendant and against the defendant Yep on the second count of the indictment to which he plead not guilty.

Mr. Ringole: On behalf of the defendant Yep that will be, of course, subject to our objection and to our privilege to make a motion to strike out.

Mr. Constine: At this time the Government will rest its case, Your Honor. In view of those objections we will ask that all the evidence which has been admitted subject to their motion. They may wish to make a motion of acquittal at this time; I don't know. We will rest.

Mr. Riordan: It is now 4:05, Your Honor. I would like to make a motion, as Your Honor knows, in relation to this [149] evidence. Would you like to hear it at the present time?

The Court: Whatever you wish.

Mr. Riordan: If I had my wish I would rather do it tomorrow morning, Your Honor.

The Court: Ten o'clock tomorrow morning.

(Whereupon an adjournment was taken until 10 o'clock a.m. Thursday, April 26, 1956.)

Morning Session, April 26, 1956,

10:20 a.m.

The Clerk: United States versus Yep and Ong, for further trial.

Mr. Constine: Ready for the United States, Your Honor.

Mr. Riordan: Ready for the defense, Your Honor.

Mr. Constine: It is the status of this case, Your Honor, that the Government has rested, and I believe that counsel has some motions to make before Your Honor.

The Court: All right.

Mr. Riordan: Yes. If it please the Court, at this time I would move to strike or exclude the evidence upon the grounds that the Court overruled my objection as to the incompetency, irrelevancy, and immateriality of the evidence that was produced on this stand as to Johnny Ong, and also as to all hearsay statements that were allowed during the course of this hearing, on the grounds that the same were made outside the presence of defendant Ong; that they were matters that were hearsay, that were allowed into evidence without the establishment of the corpus delicti of the conspiracy, being the agreement, and the fact that whatever hearsay statements are allowed in during the course of this trial were not or could not in any way be construed as matters in furtherance of a conspiracy.

Now, I will eliminate some of the, perhaps, tech-

nical [151] objections that I have. Very briefly now, I am going to object to any statements that were made by the agents, any acts or failures to act in relation to statements made by the agents on the part of Johnny Ong at the time of his arrest, and any statements made by his wife. Obviously, those are complete hearsay, Your Honor. In no way could they be construed as an admission against Mr. Ong or in any way in furtherance of a conspiracy.

Now, I am going to pass over some technical objections. I will object to those statements at the time of the arrest and after the arrest, on the grounds that the arrest was made after long surveillance, and obviously, as this sale was at 10:15 the previous evening, there was time, in my opinion, to get a warrant for arrest.

Another objection I have on that ground is that there was lack of reasonable cause to believe that a felony was being committed or had been committed by Johnny Ong.

Another objection that I will have, Your Honor, is that a search of the house was made to ascertain, you will recall, as to whether or not there was a telephone in the home of Mr. Ong. I object to any search of Mr. Ong's home, on the ground that no warrant for the search was obtained, they having had plenty of time to obtain the same.

I also object, Your Honor, to any statements made by Rocky Yep outside the presence of Johnny Ong after Mr. Ong— [152] rather, after Mr. Yep— had been picked up and was in custody; that obviously, even assuming that there had been a con-

spiracy, it was after the last overt act, and it was at the time of the apprehension and could not, in any way, be construed as a furtherance of a conspiracy.

Your Honor, I know you know the evidence better than I do, so I won't—

The Court: How could that be possible?

Mr. Riordan: Well, I think you at least know it as well as I do.

The Court: You are the one that presented it. You are more familiar with your case than I am. I am just here, patiently listening to you gentlemen.

Mr. Riordan: That is right, Your Honor. On the ground of the fact that that conspiracy, Your Honor, had not been charged—or rather, had not been proven—we have to look at this matter on the basis of the obligation that the Government has to prove their case beyond a reasonable doubt and to a moral certainty—that they did not prove any conspiracy or agreement between these two parties, that is no showing of the prime requisite of intent by Johnny Ong. There is no showing of knowledge by Johnny Ong in any acts on the part of Rocky Yep or any intentions on the part of Rocky Yep, or any evidence of Johnny Ong joining as to the intentions of Rocky Yep. [153]

That concludes my motion for the exclusion of the evidence, Your Honor.

Mr. Constine: Does Mr. Ringole wish to make any motion?

Mr. Ringole: May it please the Court, I join in that motion. I want to cite, Your Honor, a few authorities, pro and con.

Counsel will unquestionably admit that the acts and declarations of a defendant, to charge a co-conspiracy, cannot be admissible—and that it is hearsay—in proof of a conspiracy. Here you have in the record—and it is very difficult to separate from the rest of the testimony—you have in the record a great many statements made by Yep outside the presence of the defendant. Now, the overt acts in this particular case are all very innocent acts. That is a very essential thing in the case. The overt acts consist of nothing but meetings—meetings and nothing else—at various periods of time.

Now, there is a case, may it please Your Honor. It is the Moloney case in 200 Federal Second 344 in which the co-conspirator—alleged co-conspirator—Foley, was with Moloney for two weeks, engaged in being with him, maintaining his home. They were very close friends. During that time—I think it was during that two weeks; now, I'm not positive about that, counsel——

Mr. Constine: Yes, I remember that case. [154]

Mr. Ringole: I'm not sure it was within the two weeks, but during a period probably within the two weeks, in that two weeks Maloney sent an extortion letter, and thereafter Moloney and Foley, in a car with the rear license plate off—containing Moloney's shotgun—went to the point of rendezvous, where they were captured by the FBI, and the court reversed the conviction of Foley because of the fact that there was no proof of any kind that he knew that the extortion letter had been mailed.

In another case—that of Crimmins, 123 Federal

Second 271—in that case, may it please Your Honor, Crimmins was a dishonorable attorney who was found guilty of obtaining—of purchasing stolen securities. He lived in Syracuse, New York. The vendor lived in New York City and went from New York to Syracuse with the stolen securities. The charge was conspiracy to take those—to steal these securities and transport them across the state line. The conviction of Crimmins was reversed because there was no proof indicating at all that he knew—though the suspicion was great—no proof at all that he knew they had been stolen in, let us say, Georgia or Virginia and brought across the state line. Since there was no proof of that part of the conspiracy, despite all these overt acts, there was a reversal.

Now, I want to say this to Your Honor: If Your Honor is suspicious that Ong is the source whence Yep obtained this [155] heroin, Your Honor's suspicions, in my humble judgment, are well founded. I am suspicious of that. But we are in a court of law. We don't convict men of suspicions because, under the cases—under the law in a circumstantial case—the hypothesis that leads to innocence must rather be adopted by the court than the hypothesis that leads to guilt.

I regard Your Honor's ruling on my question, that it was argumentative, as correct; but it was a good argument when you consider the fact that just before they brought the baby out, he went in to the drugstore where he could have gotten the stuff in the drugstore. He could have had it already in his possession for months. Now, there is no reason why

anybody should think they had this stuff concealed in the diaper of the baby, for the reason, Your Honor, that these men never knew that they were under surveillance, and why should they do what they did and have a baby involved if they never knew they were being watched? They could have easily gone into their room and gotten the stuff out. So there is no question in my humble judgment, upon this record and having regard for reasonable doubt, and the fact that it has been held that it must be shown beyond a reasonable doubt.

The *Schneiderman* case holds, in 106 Federal Supplement, that suspicion that the overt acts were committed in furtherance of a conspiracy or with the object of conspiracy is not enough. [156]

Now, here is the argument against me, Your Honor. It is predicated upon the *Blumenthal* case, 158 Second, isn't it, page 883, and I am going to distinguish that case.

That argument—the argument used is this, that the overt acts themselves can be the basis for proving the conspiracy. Now, there is no question about it. That case is predicated upon the principle of the case that it cites, namely, that if you see two men breaking into a bank at the same time it is a reasonable conclusion—it is conclusive, as a matter of fact—that those two men are engaged in a conspiracy to burglarize that bank. There is no question about that.

But in this case, as well as in the *Blumenthal* case, all of the overt acts testified to were criminal, in and of themselves.

As a matter of fact, in the Blumenthal case, the attorneys argued that the overt acts proved that the defendants were guilty of independent crimes but were not guilty of a conspiracy, and the Circuit Court of Appeals held that those criminal acts in the concert of all the defendants in those criminal acts were sufficient to convict.

Now, in this case every act was innocent. This case comes right within the principle of the *Crimmins* and *Moloney* cases, and it comes within the language of the *United States versus Di Re* case; and the United States Supreme Court decided in another case—I don't have it at hand just at the moment, [157] I don't see it here just at the moment—that the courts will not lightly convict on the testimony or proof of meetings between the alleged conspirators.

I submit, Your Honor, that the motion to strike should be granted.

Mr. Constine: May it please Your Honor, I would not ordinarily make any lengthy statement of the law, as I am sure Your Honor, with your experience, knows the law of conspiracy. However, in view of counsels' statements—

Mr. Ringole: Could I interrupt you for just a second? I want to say this to Your Honor—I forgot to say it—that I made this argument to His Honor, Judge Harris, in the trial of another case, and His Honor found Yep guilty, despite the argument that I made.

Mr. Constine: Thank you, Mr. Ringole.

I might say, Your Honor, that this is a motion

for an acquittal, being made by the defendant at the end of the Government's case. They have not yet produced——

Mr. Riordan: I don't believe that is correct, Your Honor.

Mr. Ringole: Yes, I make a motion for acquittal, if counsel doesn't.

Mr. Riordan: It is my understanding that I first make my motion to exclude the evidence and, following that, the Court makes a ruling, and of course if the evidence is excluded, then on my motion of acquittal I argue the evidence [158] which is presented in the absence of the hearsay.

The Court: We will have a complete record. Do you make a motion?

Mr. Ringole: Yes, we make the motion; make the motion for acquittal now.

The Court: And assign the legal reasons for it. If you are not prepared, I will take a recess and give you time.

Mr. Riordan: Yes, Your Honor, so the record may be established I think I should request the Court to rule on my motion.

The Court: For the record, then, to take advantage of any error the Court may make——

Mr. Constine: Well, if counsel desires, I will argue the evidentiary questions now, and Your Honor can rule on that, and then he can make his motion.

The Court: Let me say this to you: If you are going to have a proper record in this case, it is

necessary to point out to this Court in every detail the evidence that you wish excluded.

Mr. Constine: Counsel has done that, Your Honor.

Mr. Riordan: We want all the admissions of Mr. Yep excluded.

The Court: That is for the Court to rule upon.

Mr. Constine: We agree with Your Honor, but that is what counsel has done. [159]

Mr. Riordan: Yes, Your Honor; the hearsay statements.

The Court: How can I make a sweeping ruling here in this case that all the testimony will go out without pointing it out?

Mr. Riordan: Yes, Your Honor. I refer to the testimony that I have been referring to previously, as I pointed out. I don't think I have to repeat that. It is in relation to the statements that were made at the time of the arrest of Ong.

The Court: At the time of the arrest if the persons here before the Court were present, they are bound by that statement at that time and place, when they were saying, "Did Johnny Ong have anything to do with this?" and he said, "No he didn't."—

Mr. Constine: Counsel is not repeating the testimony as it was given in court, Your Honor. However, aside from that, any statements made by Mr. Yep at the time of his arrest and after his arrest are admissible only against Mr. Yep, and we asked they be introduced only for that purpose.

The Court: They went in for that limited purpose.

Mr. Constine: That is understood.

The Court: And didn't bind the other defendant.

Mr. Constine: Not after his arrest, that is correct.

Mr. Riordan: Also, the statements I am referring to, Your Honor, are those statements by Mr. Yep in the apartment of [160] Mr. Wu, in which he referred to the fact that he had a local contact. This local contact was about to purchase a Cadillac automobile, and he stated that he advised him not to purchase the automobile, and giving the reasons therefor. Also, the fact that he described his local contact—I believe up in Wu's apartment again—as being a man who has a good family reputation, is above suspicion; a man who was formerly engaged in gambling or was known as a big gambler in and about San Francisco, and a person who had worked, I believe he said, in a cannery—or words to that effect.

Mr. Constine: My answer to that, Your Honor, is every act and declaration of each member of a conspiracy in furtherance of the conspiracy is considered the act and declaration of all the conspirators—that is, during the course of the conspiracy—and those admissions are admissible against all the conspirators, in conformity with the general rules of law and the law of this Circuit. I will cite all the cases Your Honor wishes me to cite. This is during the course of the conspiracy, before Mr. Yep's arrest, and those are admissible.

The Court: So the record is clear, what purpose did you have in relation to this Cadillac car and the sale of it? What was that evidence introduced for?

Mr. Constine: For two purposes: For the purpose of identifying his connection. He stated that he had warned his [161] connection not to buy a 1955 Cadillac car because it would look suspicious and because the man had no job. The day before, the agents observed Mr. Yep and Mr. Ong together at the Cadillac lot. So that is admissible and relevant for the purpose of identifying this man as the connection.

The Court: This man you are pointing to?

Mr. Constine: Mr. Ong. The agents also testified they observed Mr. Ong and Mr. Yep in that very Cadillac. Then the agent testified that on the 17th and on the 19th of April—of February, and I will check those dates to be sure I am citing the correct dates—on February 17th and on February 19th Mr. Wu testified that Mr. Yep offered to place this car—this same 1950 Cadillac car—as security to secure a narcotic transaction, and therefore that is relevant to show that this man's automobile was being considered as security in the narcotic transactions in the future. I think that is all relevant to go to the weight of the evidence, to show the connection of Mr. Yep and Mr. Ong, and the identity of Mr. Ong.

Mr. Riordan: May I point out one fact in relation to that argument, Your Honor? I believe that the testimony of Wu is that Mr. Yep said, "A man

who is dealing," not saying "The man," and he did not say—I am attempting to quote Mr. Wu as close as I can—he did not say this was the man who was the supplier. Now, I believe that is the correct [162] quotation.

Mr. Constine: He referred to him as the same connection he had been talking about all along, Your Honor—Mr. Wu did—and if there is any question they can put Mr. Wu back on the stand and reopen the case.

The Court: Will it stand submitted?

Mr. Constine: Submitted.

Mr. Riordan: Yes.

The Court: The motion to strike will be denied.

Mr. Riordan: I at this time, Your Honor, move for a judgment of acquittal on behalf of defendant Johnny Ong. It is my understanding of the law, Your Honor, on this particular motion, that it is the sole duty of the trial judge to determine whether substantial evidence, taken in a light most favorable to the Government, tends to show the defendant guilty beyond a reasonable doubt. Now, it is my contention, Your Honor, that there is absolutely no substantial evidence in this case which would tend to prove this defendant, Johnny Ong, guilty beyond a reasonable doubt.

Firstly, let me state, Your Honor, just in opening, that I believe the defense of entrapment is properly before this Court. My recollection—again I may be wrong on it, but I will put it forward to the Court—is that on the first day of February, 1956, Mr. Wu telephoned Mr. Yep and asked him

to come to his apartment. I submit to the Court that the facts [163] as shown before this Court are evidence of entrapment on the part of the Government, through Mr. Wu, to have Mr. Yep engage in the sale of narcotics on that particular day. If that be true, then it in turn inures to the benefit of defendant Ong.

Again, Your Honor, I submit—or I state at this time—that there is no substantial evidence before the Court from which this Court can state that, beyond a reasonable doubt, a conspiracy has been proven on the part of Mr. Ong and Mr. Yep. There is no evidence of knowledge by Johnny Ong as to any acts or intentions on the part of Mr. Yep. There was no evidence of any intent on the part of Johnny Ong to deal in narcotics in any fashion. There was no evidence of a mutuality of intention and act on the part of Johnny Ong and Mr. Yep to deal in narcotics.

I think substantially that the Government's case can be seen in the overt acts—at least their case against Mr. Ong—in their overt acts, as alleged in their indictment from No. 2, No. 3, and No. 4. They state that Wee Zee Yep entered the residence of Johnny Ong on February 1st; that on or about February 1st Wee Zee Yep and Johnny Ong travelled together in an automobile; that on or about February 1st Wee Zee Yep and Johnny Ong met at 1003 Jackson Street. That is, in its crystallized form, the evidence that has been produced before this Court, in addition to the overt act of the sale by Mr. [164] Yep. They have proven here, Your

Honor, meetings between Mr. Yep and Mr. Ong. I cite to the Court, as Mr. Ringole did, the case of the United States versus Moloney, in which it was stated:

“A casual association is not evidence of participation in a conspiracy. Presumptions of guilt are not to be indulged in from mere meetings.” I cite, also, the case of the United States versus Blumenthal, 88 Federal Second 522. I will give a brief analysis of the evidence in relation to Mr. Blumenthal in that case.

One, Merchlewitz, was seeking to purchase unlabelled alcohol. He met defendant Blumenthal, who told him to go see Sam. Merchlewitz went to see Sam, and he purchased unlabelled alcohol. The Court held, Your Honor, that there was no evidence, direct or circumstantial, warranting a finding of any agreement between Blumenthal and the other defendants.

“The evidence might be sufficient to arouse suspicion, but it could only reach that dignity by pyramiding presumptions.”

There was no substantial evidence in this case to warrant a finding or a judgment or a verdict of guilty against Mr. Blumenthal.

Mr. Ringole cited the case of the United States versus Di Re. The citation is 332, United States 581. Again, I will [165] recite and attempt to crystallize the facts of that case.

A federal agent was informed that A was to sell B ration stamps. In fact, B is the person who gave the information to the federal agent. A and B

met at point X. The agent and a police officer also drove to place X, and they found B, that is the informer, sitting in the back seat of the automobile, holding ration stamps. Now B, the informer, said that he had obtained the ration stamps from A. Now, the defendant, Di Re, was sitting in the front seat with A, and B in the back seat. A search was made and, as I recall the facts, within the defendant Di Re's shirt was found an envelope containing numerous forged ration stamps.

The Court, in discussing the element of conspiracy involving Di Re with A and B, stated that the presence of Di Re in the car did not authorize an inference of participation by Di Re in the sale of coupons from A to B. It stated, Your Honor, that presumptions are not to be lightly indulged in from mere meetings, and I might also state mere presence.

Now, Your Honor knows that a conspiracy has been classically termed in many fashions, and I think every expert I have ever heard talk about conspiracy says, "Well, it is a very difficult thing to define, despite the many and varied definitions." Basically, I think—at least, in my opinion—the word that most clearly portrays the existence of the [166] conspiracy is that of a partnership, as we understand the partnership in everyday meaning of the word. It is an act of agreement of two people, intending jointly or together to do a specific act. Now, a mere agreement, of course, it not a crime. We have it every day in the business world. It is the doing of an act as applied to this case, which would be criminal in nature. The agreement—the

existence of this partnership, Your Honor—in the field of criminal law must be shown by the Government beyond a reasonable doubt and to a moral certainty. We cannot indulge in suppositions. We cannot indulge in inferences in attempting to overcome this presumption of innocence that exists in favor of every defendant that comes before this court.

We must have some evidence, Your Honor—not necessarily direct, but at least some evidence—showing a criminal partnership.

I contend, Your Honor, that there is no direct proof of a conspiracy in this case, and I don't believe that the evidence that was brought before this court has risen to the dignity of even circumstantial proof of a conspiracy existing in this case. We can only go back to the very foundation upon which any defendant is before this Court, where he is clothed with the presumption of innocence. We can only go back to the fact that the acts that are shown before this court are mere meetings between two individuals, and that [167] meetings alone do not give rise to an inference of guilt in this case.

We are dealing with a very serious charge, and this man remains and stands before this Court with the presumption of innocence, and I contend the Government has not sustained its burden of overcoming and establishing beyond a reasonable doubt the guilt of Johnny Ong.

Mr. Ringole: I associate myself, Your Honor, with counsel on behalf of the defendant in this motion.

Mr. Constine: May it please Your Honor, I understood this was a motion for acquittal at the close of the Government's proof. Now, with reference to the statement that the defendant is entitled to the presumption of innocence as such, I can only say there has been no defense yet. This is a motion at the close of the Government's case, where all the Government's evidence is in, and the only question in this case is, is there a *prima facie* case at this time. At the close of the defense, whatever the defense may be, then is the time to argue the evidence on whether there is a presumption of innocence and whether that presumption has been overcome.

So I only cite to Your Honor the fact that this is merely a motion for acquittal to determine whether we have established a *prima facie* case, and if all the Government's evidence is believed true whether we have established a sufficient case to enable them to go on with their defense. That is the only [168] point here. The case has not been submitted to Your Honor for final judgment.

The same argument you heard this morning was heard in the United States versus Yep and Jong a week or so ago before Judge Harris, and I will say that the best explanation to make to the Court is to cite the law in this circuit on the law of conspiracy and as to the law of *corpus delicti*, because what counsel and Mr. Ringole have completely overlooked are the admissions made by Mr. Yep in identifying Mr. Ong as a co-conspirator and the omissions of Ong by his silence at the time of his arrest, which have been admitted into evidence.

I might say this to you, that the law in the State of California, I understand, is somewhat different from the law in the Federal Courts and this Circuit. In this State you must prove the corpus delicti, independently of the admissions of these defendants. Of course, that is not the law in the Ninth Circuit. Your Honor is well aware of that, because of your own case, the United States versus Tokyo Rose in this Circuit. I will cite that.

It is the United States versus—I believe her name was D'Aquino, but she was commonly called Tokyo Rose. It was in 192 Federal Second 338, which was of course affirmed. It asserts that it is unnecessary to make full proof of the corpus delicti, independent of admissions or confessions by defendant.

Ninth Circuit is quite liberal, and I wish, for the record, to cite the case of Pearlman versus United States, the leading case in this Circuit, 10 Federal Second 460, cited by Judge Roche in United States versus Tokyo Rose, which held that the defendant's own admissions and confessions can establish a corpus delicti if there is some slight corroboration which, of course, is different than the law in the State of California, as I understand the law. I wish to state that counsel's definition of a conspiracy is not quite the definition of Ninth Circuit. A conspiracy is a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose. No formal agreement is necessary in the formation of the conspiracy. Fowler versus United States, Ninth Circuit, 273 Federal 15.

Now, Your Honor, going to the case of Moreno

versus the United States, 91 Federal Second 693—and I cite this for the record so that we may have these citations—the crime is completed when an overt act to effect the object of the conspiracy is done by at least one of the conspirators.

There is the Blumenthal case—not the same case that counsel cited, apparently, but a different one, a later one, which was affirmed by the United States Supreme Court from Ninth Circuit, 158 Federal Second 883, and it stands for the proposition that the overt acts may constitute the best proof of the conspiracy, and such evidence is often used for that [170] purpose.

Now, there is another Pearlman case, in the Ninth Circuit 20 Federal Second 113, which says, Your Honor, certiorari was also denied by the United States Supreme Court. This is the law in the United States, and I would like to read the language of that case just for a moment which applies to the very case before Your Honor:

“The claimed offense is one which, from its very nature, can rarely be proved by direct evidence. Ordinarily, only the results of a conspiracy, and not the private plottings, are observed. Like any other issue of fact, conspiracy may be proved by circumstantial evidence. The crime is almost always a matter of inference, deduced from the acts of the persons accused, which are done in pursuance of an apparent criminal purpose.”

Now, Your Honor, counsel has cited a number of cases where they say mere association is not sufficient to establish a conspiracy. I am familiar with those cases, and we have no quarrel with those

cases. However, in none of those cases did the defendants make admissions during the course of the conspiracy, linking the other members of the conspiracy, as they have here.

In this case, this is what we have: We have a number of meetings between this defendant and the other defendant, [171] observed on the very day the narcotics are transferred; not one meeting at the time, I believe it is five meetings during that one day for a few seconds—for a few minutes—at different parts of town, before the money passed hands, before the narcotics were delivered.

After the narcotics were delivered they were observed, but those are just the meetings. We have the fact that Yep identified Ong as the man who was his connection, and of course, we have the case of *Egan versus United States*, 137 Federal Second 369, decided in the Eighth Circuit. Although Your Honor has admitted the evidence of this defendant's admissions—Ong's admissions—at the time of his arrest, I wish to read to you what the case says. The general rule is the Federal Rule that "when a statement tending to incriminate one accused of committing a crime is made in his presence and hearing and such statement is not denied"—corrected or objected to by him—"both the statement and the fact of his failure to deny are admissible in a criminal prosecution against him as evidence of his acquiescence in its truth."

That is where this defendant was accused of delivering the narcotics to Mr. Yep on the night in question, and he remained silent, made no explanation at all of his activities on that night.

I agree with counsel, Your Honor, that one incident, one circumstance alone does not establish a conspiracy. There is [172] no question about that, and we have no quarrel. But I can only say this to Your Honor, without going into all the facts of the case now, when you pile circumstance upon circumstance upon circumstance, incident upon incident, and coincidence upon coincidence, activity after activity—not one selected instance but a continued pattern of conduct, then the picture of these defendants' conspiracy becomes whole and clear. I might say that this case is somewhat difficult from the fact that Mr. Yep, at his arrest, stated that he wished to take the rap for the other co-conspirators. His statements during the course of the conspiracy, the defendant Ong's failure to deny the accusation, their activities observed by the agents, is substantial proof, at least at this point of the case—there is no defense as yet—to establish a *prima facie* case, and I say we have more proof here, more substantial proof than you have in most narcotic conspiracy cases brought before these courts.

I submit the motion be denied, and the defendant proceed with his defense of the case.

The Court: May the matter be submitted?

Mr. Constine: Submitted, Your Honor.

The Court Is the matter submitted?

Mr. Riordan: Just one reply, Your Honor. I would like to briefly read a statement by the Federal Court in the case of Montford versus United States, 200 Federal Second, 759, in [173] which it was stated, "a defendant's connection with the conspiracy cannot be established by extra-judicial

declarations of a co-conspirator made out of the presence of the defendant, and there must be proof aliunde of existence of the conspiracy and of the defendant's connection with it before such statements become admissible against defendant not present when they were made."

Mr. Constine: Is that a Ninth Circuit case?

Mr. Riordan: I don't know.

Mr. Constine: Well, the rule of the Ninth Circuit is different, Your Honor. I cite Your Honor's own Tokyo Rose case.

The Court: For the purpose of the record, the motion at this time will have to be denied.

We will take a recess.

(Recess taken at 11:02 a.m.) [174]

Mr. Ringole: I want to state, Your Honor, on behalf of this defendant Wee Zee Yep that I represent that he will not take the stand.

Mr. Riordan: Mr. Ong, take the stand, please.

ONG WAY JONG,

(Also known as Johnny Ong)

one of the defendants herein, called as a witness in his own behalf; sworn.

The Court: Your full name, please?

A. Ong Way Jong.

Q. Spell it.

A. O-n-g W-a-y J-o-n-g, also known as Johnny Ong.

Q. Johnny what? A. Ong.

The Court: Take the witness.

(Testimony of Ong Way Jong.)

Direct Examination

Q. (By Mr. Riordan): Ong Way Jong is the name that is on your birth certificate; is that correct? A. Yes, sir.

Q. And you have been known as Johnny Ong; is that correct? A. That is correct.

Q. When did you adopt the name Johnny Ong? Can you state?

A. I have been using that name ever since I was going to school. [175]

Q. How old are you, Mr. Ong? A. 27.

Q. Now, Mr. Ong, did you ever sell to Rocky Yep any narcotics? A. No, sir.

Q. Did you ever dispense to Rocky Yep any narcotics? A. No, sir.

Q. Did you ever distribute to Rocky Yep any narcotics? A. No, sir.

Q. Did you ever agree with Mr. Yep to sell narcotics? A. No, sir.

Q. Did you ever agree with Rocky Yep to dispense narcotics? A. No, sir.

Q. For the purpose of the record, Rocky Ong is the individual——

Mr. Constine: Yep.

Q. (By Mr. Riordan): I'm sorry, Rocky Yep is the individual who is indicted with you and you know him as Wee Zee Yep; is that correct?

A. That's right, sir.

Q. Did you ever agree with Rocky Yep to distribute narcotics? A. No, sir.

(Testimony of Ong Way Jong.)

Q. Did you ever agree to conceal or transport any narcotic drugs? [176] A. No, sir.

Q. Mr. Ong, how long have you known Rocky Yep?

A. Oh, I would say about a good ten years.

Q. And when did you first meet him?

A. Gee, I couldn't remember that. I knew him when we was kids, both.

Q. And when you first met him where did you live? A. 833 Washington Street.

Q. And where did Rocky live?

A. About the 700 block on Washington Street.

Q. And that is Washington Street here in San Francisco? A. Yes, sir.

Q. About how far from his house was your house? A. About half a block.

Q. Have you been friendly with Mr. Yep for some time? Have you gone around with him for some time? A. Yes, sir.

Q. And do you consider him your closest friend?

A. Well, no, not closest friend, but I have seen him all the time and talked to him all the time.

Q. And besides Mr. Yep did you go around with other people? Was there a crowd that Mr. Yep belonged to and you belonged to? A. Yes, sir.

Q. Now, Mr. Ong, did you ever discuss with Rocky Yep the [177] fact that you would give him your automobile or any automobile that you owned as security or an automobile to have anything to do with any narcotics dealing? A. No, sir.

Q. Now, Mr. Ong, you heard the testimony by

(Testimony of Ong Way Jong.)

the government agents here yesterday, and do you recall they stated that when you were arrested they accused you of being a part of a narcotics ring, or words to that effect? Do you recall that?

A. Yes, sir.

Q. And did you make any reply to this accusation? If you don't understand any word I am using, Mr. Ong, you tell me right away and I can rephrase it.

A. What do you mean by that?

Q. Did you make any statement back to the agents?

A. Not that I can remember, sir.

Q. And is there any reason why you did not reply or say something to the agents?

A. The reason why because when they picked me up they told me about Rocky Yep and that he was being picked up and they come and asked me about it. I didn't want to say anything because I don't want to get my friend involved, because I am a friend of Rocky's, and they picked me up, so I don't want my friend to be picked up, being innocent.

Q. Have you ever in your lifetime been involved with [178] Rocky Yep—let me withdraw that question, please.

Have you ever been charged in any court with gambling and had the charge dismissed?

A. No, sir.

Q. Do you recall the date of February 1, 1956?

(Testimony of Ong Way Jong.)

That is the date you are accused of having participated in a conspiracy with Rocky Yep.

A. The only thing I can recall on February 1st is that the agent stated that the little boy was with me, and I can recall that clearly, because that night the kid was with me I took him to the barber shop. That was his first haircut in a barber shop.

Q. And how many children do you have, please?

A. Two.

Q. And what are their names?

A. The oldest one is Jeffrey Michael Ong.

Q. And how old is he? A. About 4½ years.

Q. What is the name and the age of the youngest? A. Gerald Kevin Ong.

Q. And you commonly refer to him as Kevin, by his middle name, is that correct? A. Yes.

Q. Which child did you have getting the haircut on this particular day? [179]

A. Kevin, the small one.

Q. And you state that you recall this particular day because this is the first time little Kevin had his haircut at a barbershop; is that correct?

A. That is correct, sir.

Q. Now so we can eliminate some of these preliminary matters, Mr. Ong: Do you recall testimony yesterday by the agents that they saw you at the race track on February 7th? That is the date on which you allegedly bought this car, is that correct? A. That is correct, sir.

Q. And they stated that you were seen there with Mr. Rocky Yep? A. No.

(Testimony of Ong Way Jong.)

Q. Do you recall them stating that?

A. Yes, I recall them saying that.

Q. The 7th day of February is the day on which you purchased the car, is that correct?

A. That is correct, sir.

Q. And you heard the agent state that this was a day on which harness racing was going on at Bay Meadows, or at least at the San Mateo Race-track. I will ask you, Mr. Ong, do you recall at the present time being at the San Mateo Racetrack the day that you purchased this automobile?

A. No, sir. [180]

Q. Do you ever recall during this year being at the San Mateo Racetrack when they had harness racing?

A. No, sir.

Q. Now you heard the testimony yesterday, Mr. Ong, about Rocky Yep coming to your house on the first day of February and I believe also on the 7th day of February. Has Rocky Yep been to your house many times?

A. Yes, sir.

Q. And could you tell us approximately, or the Court, how often he would come to your home?

A. Oh, he used to come there—come into my house about three or four times a week, at least.

Q. I see.

A. Especially when Bay Meadows was running, he always stopped by my house first before he would go to the track and have lunch.

Q. Do you recall whether or not he was at your home on February 1 of this year?

A. I don't recall that, sir.

(Testimony of Ong Way Jong.)

Q. Is it possible that he could have been?

A. He could have been, yes.

Q. Mr. Ong, you heard the testimony yesterday of the agents in which they stated that Mr. Rocky Yep got into your automobile around 3:00 or 3:30 or 3:50 on the afternoon of February 1. Do you recall him getting in at that time [181] at all?

A. No, sir, I don't recall that.

Q. Now you recall the testimony at some time around 7:00 or 7:30 Rocky Yep got into your automobile on this February 1 date; is that correct?

A. Yes.

Q. Can you state at this time whether or not you recall him getting into your automobile at that time?

A. He might have been, yes. In fact, I think—I think he did that night at 10 o'clock.

Q. Now, Mr. Ong, what time did you leave your home—let me ask a preliminary question.

Where did the little boy get his haircut?

A. On Waverly Street, Mel's Barber Shop.

Q. And is that your customary barber there?

A. Yes, sir.

Q. What time did you leave your home with your child to go to Waverly Street to get this haircut?

A. Oh, about 6:30 that evening.

Q. And can you recall at this time after you left your home where you went first, or where you parked or what you did?

A. I went up to Chinatown and I stopped by at a social club on Spofford Alley first for about ten

(Testimony of Ong Way Jong.)

minutes and then I took the kid to the barber shop.

Q. And when you say a social club, what do they do in the social club? A. They play mah jong.

Q. And what is mah jong?

A. That is a Chinese domino game or something like that.

Q. Where did you go then?

A. Then I took the kid to the barber shop.

Q. And what happened when you got to the barber shop?

A. My regular barber is not in and so I left. I went back to the barber shop a little later.

Q. And what time did you return to the barber shop? A. Oh, about 7 o'clock.

Q. About 7 o'clock. And you stated that you believe you saw Rocky Yep some time around 7 o'clock; is that correct?

A. That is correct, sir.

Q. As far as you can recall, did you see Rocky Yep before you returned to the barber shop a second time around 7 o'clock or after?

A. What was that question again, now?

Q. Do you recall at the present time—you testified that you went to the barber shop once around 7:00; is that correct? A. That is correct, sir.

Q. Maybe I misunderstood you, sir. And you stated you went there and your barber wasn't there; is that correct? [183]

A. That is correct.

Q. So you did leave the barber shop then?

A. That is correct.

(Testimony of Ong Way Jong.)

Q. And where did you go then?

A. I went up — my intention was going up to Lucy's Place on Jackson Street.

Q. On Jackson Street. How did you get up—did you go to Lucy's Place?

A. I rang the bell but nobody was in.

Q. How did you get from the barber shop on Waverley Street up to Lucy's Place?

A. I drove up on Jackson and turned up on John Street trying to look for a parking place.

Q. And did you see Rocky Yep at this time that you can recall? A. Yes.

Q. And what was Rocky Yep doing?

A. Well, I remember distinctly Rocky was sitting in his car and he came out at the time and talked to me. He said he was listening to the fights that night.

Q. And did he then get into your car?

A. He might have been. Now if he did, we drove up to Lucy's Place to see if Lucy was home or not.

Q. And then you did get to Lucy's Place and she was not home; is that correct? [184]

A. That is correct, sir.

Q. And what did you do then?

A. I went back to the barber shop.

Q. About what time did you arrive back at the barber shop, do you recall?

A. I would say about a little after 7:00; I don't recall the exact time.

Q. And what happened when you got into the barber shop?

(Testimony of Ong Way Jong.)

A. Well, my regular barber was in and he was kind of busy and he told me to come back after closing time.

Q. And what time was closing time?

A. Nine o'clock.

Q. And where did you go then?

A. I went back up to Lucy's place. I went up to her sister-in-law's place—apartment. It was in the same building.

Q. As Lucy? A. Yes, sir.

Q. On Jackson Street? A. Yes.

Q. And where is that building in relation to 1003 Jackson? A. Just right next door.

Q. And did you see Rocky again on your second trip up to Lucy's? A. Yes, I did. [185]

Q. And where was he parked then?

A. I think his car was parked on Jackson Street, now.

Q. And you went in then and you watched TV; is that correct? A. That is correct.

Q. Did you have you little boy Kevin with you all this time? A. Yes, sir.

Q. How long were you watching TV, can you recall—approximately, of course?

A. Oh, about 20 minutes.

Q. And you then left. Who did you leave with, can you recall?

A. And the whole bunch of us left. There was Rocky, me, Lucy, Al Fong and Jack Fong I think was in there.

Q. Where did you go, if you recall?

(Testimony of Ong Way Jong.)

A. I went—that was pretty close to 9 o'clock then. I went back to the barbershop then.

Q. And did you then get a haircut in there or did the little boy get a haircut? A. Yes, sir.

Q. And about how long were you in the barbershop, do you recall?

A. I would say about half an hour to 45 minutes.

Q. And after you left the barbershop, where did you go?

A. I went back up to Duck Fong's apartment where they was [186] playing a mah jong game at that time.

Q. You say that you left Lucy's around 9 o'clock; you were at the barbershop half an hour to 45 minutes; is that correct? A. That is correct.

Q. So that would be around 9:40 or 9:45?

A. Yes, sir.

Q. Then you stated you returned up to Jackson Street. This would be around 10 o'clock, is that correct? A. That is correct, sir.

Q. Did you see Rocky Yep at this time?

A. Yes, sir.

Q. And where did you see him, please?

A. He was sitting in his car in front of Duck Fong's place.

Q. And who was with you at that time?

A. My little boy was still with me.

Q. And where did you then go?

A. I saw him sitting out there and I asked him what he was doing. He was waiting for somebody. And I told him I was going up to Duck Fong's

(Testimony of Ong Way Jong.)

place to see how the game is going on. So we went up together.

Q. And what did you do when you got into Duck Fong's? A. I played mah jong.

Q. And do you know what happened to Rocky, if anything?

A. Well, I think he stayed there for about five or ten [187] minutes, then he left.

Q.. But you were playing the game; is that correct? A. Yes, sir.

Q. And did you see Rocky leave?

A. No, sir.

Q. In relation to all of these meetings that you have referred to, Mr. Ong, during any of those meetings was there any mention or any dealings in narcotics between you and Mr. Yep?

A. No, sir.

Q. At that time or prior to that time did you have any agreement with Mr. Yep that you would have anything to do with narcotics?

A. No, sir.

Q. I show you what has been marked as Defendant's Exhibit A—I believe it is in evidence at the present time—and ask you if that is the receipt you received from the Cadillac Motor Car Division for the purchase of the 1955 Cadillac coupe deVille, or whatever it is?

A. Yes, that is the receipt.

Q. It shows there that \$1085.10 was allowed to you as a cash payment on this automobile. Can you explain to the Court that figure of \$1085?

(Testimony of Ong Way Jong.)

A. That \$1085 was—belonged to another car. I turned in two cars. That belonged to a 1953 Cadillac and they wholesaled [188] it and the balance on that car was to put on this '55 Cad.

Q. Now there is a sum there of \$1603.22. Is that cash that you paid for this automobile?

A. That is cash.

Q. Can you tell the Court at the present time where you got that \$1600?

A. Before—before I bought the car I went and asked my brother for a loan, and my sister. My brother loaned me \$1200 and my sister loaned me three hundred.

Q. When you went to purchase this automobile the day of February 7th, how much money did you have with you? How much cash money did you have with you?

A. I have with me about \$1400.

Q. And did you eventually get the other \$200?

A. Yes, sir.

Q. And where did you get that money, please?

A. I got that money from Billy Chan.

Q. And he—is he also the man who gave you the 1953 automobile to turn in? A. Yes, sir.

Mr. Riordan: I have nothing further of this defendant.

Mr. Constine: Did you finish, counsel?

Mr. Riordan: Yes.

Mr. Constine: Does Mr. Ringole wish to examine the witness? [189]

Mr. Ringole: No.

(Testimony of Ong Way Jong.)

Cross Examination

Q. (By Mr. Constine): As I understand it, Mr. Ong, you say that you were a friend of Mr. Yep's; is that correct?

A. That is correct, sir.

Q. And you have known him for many, many years?

A. Yes, sir.

Q. And Mr. Yep used to come to your house a few times a week?

A. For the past six months at least.

Q. Did he have a key to your house?

A. No, sir.

Q. By the way, do you have a telephone in your home, Mr. Ong?

A. The beginning of this year I don't.

Q. The beginning of this year you don't?

A. Yes, sir.

Q. Is there any reason why you have not a telephone?

Mr. Riordan: I will object—just a minute, Mr. Ong. I will object to that question as being incompetent, irrelevant and immaterial.

The Court: What is the purpose?

Mr. Constine: The purpose of the question is merely as a foundation. Counsel asked the witness whether he had ever been involved in any booking operations or charged with a [190] crime. I am merely making an exploratory—

Mr. Riordan: I submit, your Honor, whether this man had a telephone at the beginning of the year or not has no bearing upon whether or not

(Testimony of Ong Way Jong.)

this man has been charged or not charged with any crime.

The Court: It will be sustained.

Q. (By Mr. Constine): But you do not have a telephone now? A. No, sir.

Q. You say when the agents came in to arrest you on the night of February 22nd they told you about observing you on February 1st—your meetings with Mr. Yep, is that right? A. Yes.

Q. They accused you of dealing in narcotics?

A. Yes.

Q. Did you tell them at that time that "I had just taken my son for a haircut; that is all I was doing"?

A. I didn't tell them that, no.

Q. You didn't tell them anything, did you?

A. All I told them—did I know that they was following me or not. Then I told them no. Then they asked me was I afraid or something like that, and I said no, why should I?

Q. When they accused you of dealing in narcotics you said nothing, you remained silent, didn't you? A. That's right.

Q. Because you wanted to protect Mr. Yep; isn't that right? [191]

A. No, sir, I wanted to protect myself.

Q. That's right, you wanted to protect yourself; you didn't want to say anything.

A. Because if I say anything wrong it might incriminate me.

Q. That's right. And you know what incrimina-

(Testimony of Ong Way Jong.)

tion means, don't you? You have been committed of a felony, have you, Mr. Ong?

A. Yes, sir.

Q. That was possession of heroin in Los Angeles, wasn't it?

A. That is correct.

Q. In 1951 you were charged with that offense?

A. That is correct, sir.

Q. You pled guilty to it?

A. That's correct.

Q. You knew that Yep was dealing in narcotics, didn't you?

A. No, sir.

Q. You never discussed heroin with him?

A. No, sir.

Q. Did you ever discuss stuff with him?

A. Never did.

Q. Junk?

A. No, sir.

Q. You know what stuff means?

A. I know what it means.

Q. You know what junk means? [192]

A. Yes, sir.

Q. Now you say you weren't trying to protect Rocky, you were trying to protect yourself when you wouldn't say anything?

A. That is correct, sir.

Q. Now this automobile that you purchased, you paid \$1400 in cash, didn't you?

A. \$1600 in cash.

Q. Yes, but you only had \$1400 with you?

A. Yes, sir, that is correct.

Q. And didn't you discuss with the automobile salesman about financing the additional \$200?

(Testimony of Ong Way Jong.)

Wasn't there some discussion about perhaps getting a loan for that \$200? A. Yes, sir.

Q. There was; but you didn't want to fill out a personal history questionnaire for that loan, did you? A. No, sir.

Q. Why not?

Mr. Riordan: I will object to this, your Honor, as being incompetent, irrelevant and immaterial.

The Court: He wants to finish the question.

A. When Billy told me that he had the money, there was no sense of my going and making a loan for \$200. That is when Billy went to the station and got the \$200 so I could pay the full amount of that car.

Q. You turned in a 1951 Cadillac on that car, didn't you? [193] A. Yes, sir.

Q. And the day that you had your son with you and got the haircut you say was February 1st; was that right?

A. That is what they claimed. That is what the agent said.

Q. You don't have any independent recollection of that being on that day?

A. I am not sure of that day.

Q. It could have been February 2nd that you had your son's hair cut?

A. It could have been, yes, sir.

Q. So you don't recall, really, at this time what happened on February the 1st? A. No, sir.

Q. Do you recall meeting this man at five minutes to 4:00? A. No, sir.

(Testimony of Ong Way Jong.)

tion means, don't you? You have been committed of a felony, have you, Mr. Ong?

A. Yes, sir.

Q. That was possession of heroin in Los Angeles, wasn't it? A. That is correct.

Q. In 1951 you were charged with that offense?

A. That is correct, sir.

Q. You pled guilty to it?

A. That's correct.

Q. You knew that Yep was dealing in narcotics, didn't you? A. No, sir.

Q. You never discussed heroin with him?

A. No, sir.

Q. Did you ever discuss stuff with him?

A. Never did.

Q. Junk? A. No, sir.

Q. You know what stuff means?

A. I know what it means.

Q. You know what junk means? [192]

A. Yes, sir.

Q. Now you say you weren't trying to protect Rocky, you were trying to protect yourself when you wouldn't say anything?

A. That is correct, sir.

Q. Now this automobile that you purchased, you paid \$1400 in cash, didn't you?

A. \$1600 in cash.

Q. Yes, but you only had \$1400 with you?

A. Yes, sir, that is correct.

Q. And didn't you discuss with the automobile salesman about financing the additional \$200?

(Testimony of Ong Way Jong.)

Wasn't there some discussion about perhaps getting a loan for that \$200? A. Yes, sir.

Q. There was; but you didn't want to fill out a personal history questionnaire for that loan, did you? A. No, sir.

Q. Why not?

Mr. Riordan: I will object to this, your Honor, as being incompetent, irrelevant and immaterial.

The Court: He wants to finish the question.

A. When Billy told me that he had the money, there was no sense of my going and making a loan for \$200. That is when Billy went to the station and got the \$200 so I could pay the full amount of that car.

Q. You turned in a 1951 Cadillac on that car, didn't you? [193] A. Yes, sir.

Q. And the day that you had your son with you and got the haircut you say was February 1st; was that right?

A. That is what they claimed. That is what the agent said.

Q. You don't have any independent recollection of that being on that day?

A. I am not sure of that day.

Q. It could have been February 2nd that you had your son's hair cut?

A. It could have been, yes, sir.

Q. So you don't recall, really, at this time what happened on February the 1st? A. No, sir.

Q. Do you recall meeting this man at five minutes to 4:00? A. No, sir.

(Testimony of Ong Way Jong.)

Q. Do you recall meeting him at 7:30 or 7:15 at night at John Place — John's Alley or John Street?

A. If they claim—if the agent said it was on February 1st, I would have said yes.

Q. But you don't recall now of your own knowledge, just because they say so; is that right?

A. That's right.

Q. You really don't remember anything about this, do you?

A. I remember that day when the baby's hair was first cut; it was somewhere around the early part of February. [194]

Q. The early part of February. And you remember meeting Rocky but you didn't talk about narcotics at all? A. Never did, sir.

Q. Did Rocky know about your conviction for possessing heroin? Did you ever tell him?

Mr. Riordan: Just a minute, Mr. Ong. I am going to object to that, your Honor, as to what Rocky Yep knew or what Rocky Yep didn't know about this man's past.

The Court: The objection will be sustained.

Q. (By Mr. Constine): Did you ever tell him?

A. No, sir.

Q. On the day you got the haircut for your child you drove your own 1951 Cadillac, didn't you? A. That's right.

Q. And that evening you drove the car yourself, didn't you? A. That's right.

Q. No one else drove it? A. No, sir.

(Testimony of Ong Way Jong.)

Q. Now you say that you arrived back from the barber shop about 10 o'clock at night on the day in question and you met Rocky and you went up and played mah jong?

A. Something like that; about 10 o'clock.

Q. And Rocky stayed inside for five or ten minutes?

Mr. Riordan: No, he didn't state that. [195]

Mr. Constine: That's what he said, counsel.

Mr. Riordan: No, he said he believes that Rocky stayed in there for about five or ten minutes, and he stated, "I didn't see him leave."

Q. (By Mr. Constine): Is it your best recollection that he stayed in there for about five or ten minutes with you?

A. We went in there together and the whole bunch of us was playing mah jong and I stayed in played myself.

Q. And Rocky was with you?

A. He was inside the apartment.

Q. He walked upstairs with you?

A. Yes, sir.

Q. And that was Bill Fong's apartment?

A. No, sir.

Mr. Riordan: He didn't testify to that.

Mr. Constine: I am just asking. Whose apartment was it?

Mr. Riordan: Just a moment, your Honor. He testified on direct that that was Duck Fong's apartment.

The Court: Q. Whose apartment was it?

(Testimony of Ong Way Jong.)

A. It is Duck Fong's apartment.

The Court: Let's proceed.

Q. (By Mr. Constine): Can you at this time tell us how long Rocky Yep stayed in that apartment with you when you got back about 10 o'clock?

A. As I said before, about five or ten minutes; that's all [196] I know. I was playing mah jong at that time.

Q. And that is your best recollection?

A. Yes, sir.

Q. And how long did you play mah jong?

A. For a good half an hour at least.

Q. A good half an hour at least?

A. That's right.

Q. That was before you came downstairs?

A. That's right.

Q. Didn't you meet Rocky the moment you came outside and rode around the block with him?

A. I think he went back up to Duck Fong's apartment.

Q. Let me ask you this: After Rocky left after being with you for five or ten minutes about 10 o'clock, you say you continued to play mah jong?

A. That's right.

Q. You were there at least a half hour?

A. That's right.

Q. The next time you saw Rocky you say was up in the apartment?

A. He came back in the apartment.

Q. He came back to the apartment?

A. That's right.

(Testimony of Ong Way Jong.)

Q. You didn't meet him on the street?

A. No, sir. [197]

Q. You didn't ride around the block with him?

A. I might have, yes. We came out of the apartment together and it was getting kind of late, it was getting to about close to 11 o'clock. It was getting late, and so I said I might as well go home, take the kid home.

Q. Because you wanted to take the kid home you got in Rocky's car and drove around the block, one block, and drove off again, is that correct?

A. He asked me to go with him and have something to eat and go home. I decided when we was riding in the car I might as well not, because my wife was waiting for me.

Q. Do you mean to say that you left your wife and children and got in the car to go for dinner and then changed your mind when you were in the car?

Mr. Riordan: I will object to this, your Honor; it is argumentative. He didn't mention that he left his wife and his children in the apartment at all.

The Court: Let us proceed properly.

Q. (By Mr. Constine): I ask you this question: When Rocky came back after 10 o'clock, you had been playing for about a half hour or more at mah jong?

A. Yes, sir

Q. He met you in the apartment?

A. Yes, sir.

Q. You came outside and you got into his car?

A. That is right.

(Testimony of Ong Way Jong.)

Q. And you rode around one block and came back?

A. I wouldn't say one block; about four or five or six blocks.

Q. Where were your wife and children?

A. They were home.

Q. Home where? A. At 83 Winfield.

Q. But you just said it was late, you wanted to take your wife and children home.

A. I said I wanted to take my kid home, my boy that was with me.

Q. And where was your kid?

A. Which one?

Q. That was with you.

A. He was with me all the time.

Q.. You took him in Rocky's car with you?

A. Yes, sir.

Q. Around the block once? A. Yes, sir.

Q. Around the block four or five times, I should say? A. Yes.

Q. You were thinking of going to dinner at 11 o'clock that night with your child?

A. Yes, sir. [199]

Q. And how old is your child?

A. About a year and a half—18 months now.

Q. You say that was some time around 11 o'clock?

A. I would say something like that.

Q. One second. Mr. Ong, do you recall the day of February 8th? Do you recall the time after you

(Testimony of Ong Way Jong.)

got your new Cadillac, your '55 Cadillac?

A. On February the 8th?

Q. Yes. You got it on February 1st. February 8th was after you got the Cadillac; wasn't that right?

A. February the 7th I got the Cadillac.

Q. February the 7th? A. February 7th.

Q. The day after you got the Cadillac was the 8th; isn't that right? A. That's right.

Q. You met Rocky that morning, didn't you?

A. I don't recall that, sir.

Q. Do you recall being with Rocky that morning on February 8th?

A. He might have been.

Q. You don't remember? A. No, sir.

Q. Do you recall an instance in which Rocky and you went to the mah jong game on Spofford Alley and Rocky went out for [200] dinner and came back and met you? Do you remember when that was? A. What day was that?

Mr. Riordan: I will object. How can this man remember when Mr. Yep went to dinner and came back?

Mr. Constine: I will withdraw the question. I will lay a foundation if you will just bear with me for one moment.

Q. The day that you bought the Cadillac was February 7th. A. That's right, sir.

Q. Do you remember meeting Rocky that night at the mah jong game?

A. No, I don't remember that.

(Testimony of Ong Way Jong.)

Q. Do you recall being at the mah jong game at all that night after you got the Cadillac?

A. I don't recall that, sir.

Q. You just don't remember?

A. That's right.

Q. What is your business or occupation? What do you do for a living?

A. Now? I was working for Billy—Polk and Geary gas station.

Q. When?

Mr. Riordan: You asked him now.

Q. (By Mr. Constine): At the present time you are working for him? Today? [201]

A. No, not today.

Q. Well, last week? A. Yes.

Q. How many days a week are you working?

A. Six days a week.

Q. When did you commence work?

A. What do you mean by that?

Q. When did you start working for him?

A. When I got bailed out.

Q. When you got bailed out that was when you started work?

A. For Billy. I worked for him before too.

Q. You were arrested on February 22nd, Washington's Birthday; do you remember that?

A. Yes.

Q. Do you recall telling the agents that you hadn't worked for a year?

A. I don't recall that. All I told them, I haven't been working from January or February, some-

(Testimony of Ong Way Jong.)

thing like that.

Q. Had you been working within a year of February 22nd? A. No, sir.

Q. You worked in a cannery once, didn't you?

A. Yes, sir.

Mr. Constine: I have no further questions.

Redirect Examination

Q. (By Mr. Riordan): Now, Mr. Jong, so it will be clear [202] for the Court, you associate the date of February 1st with the date that you had the haircut for the little boy; is that correct?

A. That is correct, sir.

Q. And did you have your little boy up at Doc Fong's any other night during this year except this night you are referring to?

A. I might have, yes, sir.

Q. You are attempting to recall this particular date with the specific event, and that being the haircut of your little boy; is that correct?

A. That is correct, sir.

Q. And you remember that on the night you had your little boy's hair cut you did meet Rocky Yep when he was parked on Jones street; is that right? A. That's right, sir.

Q. Was the baby in your car at that time?

A. Yes, sir.

Q. Now, any other night when you may have met Rocky Yep on Jones Street, did you ever have anything to do with narcotics or talk to him about it or deal with him in narcotics? A. No, sir.

(Testimony of Ong Way Jong.)

Q. Now, you state, Mr. Jong, that you don't recall whether or not you met Rocky Yep on the evening of February 8th at the Mah Jong Club or Social Club on Spofford; is that correct? [203]

A. That is correct, sir.

Q. However, you stated it is possible you may have met him there; is that correct?

A. That is correct, sir.

Q. Have you seen Rocky very often this year, or how many times or at all, at the Spofford club, or, rather, at the social club on Spofford?

A. He was there often. He was there about almost practically every day, or at least four or five times a week anyway.

Q. Have you seen him there sometimes?

A. Yes, sir.

Q. The question was gone into as to whether or not around eight—around nine o'clock—I am sorry—around ten o'clock when you came back from the barber shop you saw Rocky up on the corner of Jackson and Mason, that the two of you walked into 1003 Jackson Street to go to Doc Fong's apartment; is that right?

A. That's right, sir.

Q. And you state you believed it was around five minutes? A. That is so.

Q. Do you actually recall now seeing him there for five minutes? A. About five minutes, yes.

Q. But you didn't see him leave; is that correct?

A. No, sir. [204]

(Testimony of Ong Way Jong.)

Q. So that you don't know actually how long he was there, is that correct? A. Yes, sir.

Mr. Constine: That has been answered and asked three times, your Honor. He said he saw him there for five minutes.

Mr. Riordan: No, he says he believed——

Mr. Constine: The record speaks for itself.

Mr. Riordan: That is right.

Mr. Constine: Counsel is leading the witness.

Q. (By Mr. Riordan): Now, Mr. Wong, the question was asked of you whether or not you were found guilty of a felony in relation to narcotics. What year was that, please?

A. I believe it was in '51.

Q. And did you plead to that charge?

A. Yes, sir.

Q. And how did you plead?

A. I plead guilty to that charge.

Q. Will you tell the Court what were you doing, what was your occupation in 1951 when you were picked up on this charge?

A. I was a merchant seaman at that time.

Q. And where were you picked up, please?

A. Down in Los Angeles.

Q. And would you tell the Court the circumstances of your being picked up, please?

Mr. Constine: Well, now, just a moment, your Honor. [205] Before counsel goes into this, is it my understanding that he is going to open up the subject of this defendant's activities in regard to narcotics back in Los Angeles? I might say that

(Testimony of Ong Way Jong.)

if he does that the government is going to feel free to examine him about all his associates and connections at this time in the narcotic traffic.

Mr. Riordan: I don't believe that these questions, your Honor—however, I will ask for a ruling from the Court, if possible, that I feel——

The Court: To save you from yourself, I will sustain the objection.

Mr. Riordan: Very well, your Honor. I have nothing further.

The Court: We will take a recess, until two o'clock.

(Thereupon an adjournment was taken until 2:00 o'clock p.m.) [206]

Thursday, April 26, 1956—2:00 P.M.

ONG WAY JONG

(Also known as Johnny Ong)

recalled as a witness for the Defendants; previously sworn.

Mr. Constine: Is this redirect examination?

Mr. Riordan: Yes.

Redirect Examination

Q. (By Mr. Riordan): Mr. Jong, you testified in relation to meeting Rocky Yep after you walked out of the mah jong game at around eleven o'clock or at about that time; that you got into the car with him; you stated your child was with you; is that correct? A. That is correct, sir.

(Testimony of Ong Way Jong.)

Q. And you stated that your intention was to get something to eat; is that correct, sir?

A. That is right, sir.

Q. And you got in the car, and after being in the car you changed your mind and decided you would go home; is that correct?

A. That is correct, sir.

Q. Is it a common custom among the Chinese to have a bite to eat around midnight?

Mr. Constine: I will object to that, your Honor, as incompetent, irrelevant and immaterial whether it is a custom to eat at eleven o'clock at night. The acts speak for themselves. [207]

The Court: Objection sustained.

Mr. Riordan: I think that is all.

Mr. Constine: I have no questions, unless Mr. Ringole wishes to examine.

Mr. Ringole: No.

Mr. Riordan: Step down.

Bill Chan, please.

WILLIAM CHAN

called as a witness on behalf of the Defendant Jong; sworn.

The Court: Your full name?

A. William Chan.

Q. Spell it.

A. W-i-l-l-i-a-m C-h-a-n.

Q. Spell your last name. A. C-h-a-n.

Q. C-h-a-n? A. Yes.

Q. Where do you live? A. 1044 Jackson.

(Testimony of William Chan.)

Q. Your business or occupation?

A. Service station operator.

Q. Service station operator?

A. That's right.

The Court: Take the witness. [208]

Direct Examination

Q. (By Mr. Riordan): Before February 7, 1956, were you the owner of an automobile, Mr. Chan?

A. Yes, sir.

The Court: Speak up so the reporter can get it.

Q. (By Mr. Riordan): Will you tell us what type of an automobile that was?

A. 1953 Cadillac coupe.

Q. And do you own that automobile at the present time? A. No, sir.

Q. What did you do with it, please?

A. I turned it over to Johnny Ong.

Q. Is that the Johnny Ong who is sitting here in court? A. Yes, sir.

Q. What was the purpose of turning it over to Johnny Ong?

A. Because I couldn't keep up the payments and insurance. I couldn't keep up, so it was a good opportunity for me to get rid of the car.

Q. What happened to your car, if you know? Was it sold or just what?

A. The Cadillac people took the car and they wholesaled it out to a wholesaler and then they paid off the bank for me and the balance of the car was put towards Johnny Ong's car.

(Testimony of William Chan.)

Q. Now, you recall the day that Johnny Ong bought this car, do you? [209] A. Yes, sir.

Q. And were you with him when he handed over a certain amount of cash to the Cadillac people?

A. Yes, sir.

Q. How much money did he have when he first——

Mr. Riordan: Let me withdraw it; I am not presenting that question properly, your Honor.

Q. In addition to the automobile you let Mr. Jong have, did you give him any money?

A. Yes, sir.

Q. How much did you give him?

A. \$200.00.

Q. And why did you give him this \$200.00?

A. Because he didn't have enough on him to pay the balance of the car.

Q. Now, approximately what time did you on this day, February 7th, did you give him this money, do you recall?

A. About three o'clock.

Mr. Riordan: About three o'clock. Thank you very much.

Mr. Constine: One second: I have no questions.

The Court: Step down.

Mr. Riordan: Helen Ong, please.

HELEN ONG

called as a witness on behalf of the Defendant Jong; sworn.

The Court: Q. Your full name. [210]

(Testimony of Helen Ong.)

A. Helen Ong.

Q. Spell it. A. H-e-l-en O-n-g.

Q. O-n-g? A. Yes.

The Court: Take the witness.

Direct Examination

Q. (By Mr. Riordan): Helen Ong, are you the sister of Johnny Ong, the defendant here in court?

A. Yes, sir.

Q. Do you recall your brother Johnny buying a 1955 Cadillac? A. Yes.

Q. Do you recall approximately when that was?

A. Well, I know it was before he bought the Cadillac he came to me and told me that he wants to buy a car.

Q. And what else did he say to you?

A. Well, he said he needed some money and then he asked me if I can lend him some money.

Q. And did you lend him money?

A. Yes, I did.

Q. How much did you lend him?

A. \$300.00.

Q. And do you recall approximately when this was that you loaned him the money for the car? Can you give us some date?

A. Well, exactly I don't know what is the date, but I [211] recall that it was just before he got the car.

Mr. Riordan. I see. Thank you.

(Testimony of Helen Ong.)

Cross Examination

Q. (By Mr. Constine): What car is that, Miss Ong?

A. Well, the car that he wants to buy.

Q. Was this the 1951 Cadillac?

A. You mean the new car he wants to get?

Q. Yes.

A. Well, he wants to get a car; he told me just a car.

Q. He has had more than one car, hasn't he?

A. Just one car, 1951 car.

Q. And is that the car you are talking about?

A. Yes.

Mr. Constine: No further questions.

Redirect Examination

Mr. Riordan: I think that, in all fairness, this witness is confused.

The Court: She may be confused, but I am sure that you are not.

Mr. Riordan: Well, that's right, your Honor—at least I hope not.

Q. Now, you know your brother bought a 1955 Cadillac automobile?

Mr. Constine: I am going to object to leading this witness, your Honor. He can ask the questions of the witness; he doesn't have to lead her. [212]

Mr. Riordan: I'm sorry.

Q. Do you know that recently within the last couple of months your brother has bought an automobile? A. Yes.

(Testimony of Helen Ong.)

Q. What model automobile is that, if you recall?

A. The new car?

Q. Yes, the new one. A. 1955.

Q. Did you lend him money to buy that car? I am speaking of a 1955 car? A. Yes.

Q. Now, you recall that before he bought this car he had a 1951 automobile; is that correct?

A. That is right.

Q. But you are speaking of the 1955 automobile; is that right? A. Yes.

Mr. Riordan: I have nothing further.

Recross Examination

Q. (By Mr. Constine): Miss Ong, you don't know whether your brother used that \$300.00 for the car, do you?

A. He told me that he wants to buy a new car.

Q. You don't know whether he actually used that money that he borrowed from you, you weren't there?

A. Well, he have intention to buy a new car.

Q. Yes, but do you know whether he used the \$300.00 that you gave him for that car of your own knowledge?

A. Yes, he told me he is going to get a new car.

Q. Do you know whether he used that \$300.00 to buy a new car?

Mr. Riordan: I will object to the question, your Honor. She obviously cannot know.

The Court: He is entitled to a record. Answer the question.

(Testimony of Helen Ong.)

Q. (By Mr. Constine): Do you know whether he used the same money that you gave him to purchase that car? A. Yes.

Q. You were there when he handed the money over? A. I gave him the money.

Q. All you know is that you gave him \$300.00?

A. Yes.

Q. You didn't see him use the money, did you?

A. Well, he told me he is going to buy a new car.

Q. And that's all you know is what he told you?

A. Yes, he needs the money to buy a new car.

Mr. Constine: That is all.

Mr. Riordan: Nothing further.

The Court: Step down.

Mr. Riordan: Eddie Ong, please. [214]

EDWARD ONG

called as a witness on behalf of the Defendant Ong; sworn.

The Court: Q. Your full name, please.

A. Edward Ong.

Q. E-d-w-a-r-d? A. That's right.

Q. Spell the last name. A. O-n-g.

Q. H-o-n-g? A. O-n-g.

The Court: Take the witness.

Direct Examination

Q. (By Mr. Riordan): Edward Ong, are you the brother of Johnny Ong, the defendant sitting in this court? A. That's right.

(Testimony of Edward Ong.)

Q. Do you recall your brother getting a new car this year? A. Yes, I do.

Q. And what kind of a car did he get, please?

A. A 1955 Cadillac.

Q. Did you ever see that car?

A. Just once.

Q. And when was that, if you can recall?

A. Right after he bought it, about three days later.

Q. Now, Mr. Ong, did he borrow any money from you before the first time you saw this 1955 automobile? [215] A. Yes, he did.

Q. How many days before you first saw this car, can you tell me, approximately?

A. About a few.

Q. A few days?

A. I am sorry; I didn't hear.

Q. Is that what you said, a few days?

A. A few. Give me that question again.

Q. Can you recall approximately how many days before you saw the 1955 car that you loaned money to your brother John?

A. Right after I saw—he bought the car and I saw the car a few days later.

Q. You loaned him money after he bought the car?

A. I loaned him money before he bought the car.

Q. Yes, but I am trying to ask you if you can recall how many days before you saw the car that

(Testimony of Edward Ong.)

you loaned him money. If you don't understand me, tell me.

A. That would be about approximately two weeks.

Q. And how much money did you loan him?

A. \$1200.

Mr. Riordan: All right. Thank you.

Cross Examination

Q. (By Mr. Constine): When you say you loaned him \$1200, was that in cash, Mr. Ong?

A. Yes.

Q. What were the denominations of the bills?

A. \$20.00.

Q. All \$20.00 bills?

A. Twenties and tens.

Q. Twenties and tens. Did you have the money home or where did you get it? A. Home.

Q. You had the money at home, \$1200 in cash?

A. Yes.

Q. And was anyone there when you gave the money to your brother? A. No.

Q. Just you and your brother? A. Yes.

Q. And who was the first person you told about loaning this money since the incident? When was the first time you have told anybody about this?

A. Nobody.

Q. You have told nobody? Didn't you have a conversation with Mr. Riordan about this before coming to court?

Mr. Riordan: Do you understand the question?

(Testimony of Edward Ong.)

Q. (By Mr. Constine): Didn't you talk to Mr. Riordan about this incident in which you gave \$1200 to your brother before coming to court? Didn't you talk it over with Mr. Riordan?

A. All I know is, he asked me to borrow money before the time.

Q. Yes. Now, who was the first person that you told about [217] loaning the money to your brother?

Mr. Riordan: I will object to the question. There is no evidence that he ever told anyone.

Q. (By Mr. Constine): Did you ever tell anyone that you loaned money to your brother?

A. Anyone? No.

Q. Didn't you tell Mr. Riordan that before you came to court? A. Yes, I did.

Q. When was the first time you told him about it? A. That I can't recall.

Q. You can't recall that. Didn't you talk to him today about it, this morning?

A. No, not today.

Q. Yesterday? A. I can't recall.

Q. Is this whole incident hazy in your mind about loaning the money?

A. All I know is, I lent him before the time he bought the car; that is all I know.

Q. All you know is that you gave him \$1200; is that right? A. Right.

Q. That is all that you can recall, then?

A. Yes.

Mr. Constine: I have no further questions.

Mr. Riordan: I have nothing further.

The defense of Johnny Ong rests, your Honor.

Mr. Constine: What about Mr. Yep?

Mr. Ringole: He rests.

Mr. Constine: The Government rests, your Honor.

(Thereupon after argument by counsel, which is omitted from this transcript, the following proceedings were had:)

The Court: There is much to be said in your relation to this case, but I am in doubt about it being helpful in any way. But on the theory of the defense here I would have to disbelieve all the testimony of the witnesses for the Government. On the other hand, in appraising the witnesses here, and particularly the defendants themselves, I can understand how from their testimony I couldn't possibly give it the credence that I could the other witnesses, and for that reason I find both of the defendants guilty as charged in the indictment in counts 1, 2 and 3.

Mr. Constine: Does counsel have any motion to make at this time?

The Court: If there are any motions you wish to make, you can make them.

Mr. Riordan: I was going to ask for time in which to make them, your Honor.

The Court: What day for judgment?

Mr. Ringole: As to Wee Zee Yep, your Honor, I ask that [219] that go over to May 7th in connection with other matters.

The Court: Whatever date you wish, not more than two nor less than five. What is the rule?

Mr. Constine: Excuse me, your Honor. Yep was already on on a number of cases before your Honor on May 7th.

Mr. Ringole: Yes.

The Court: Is that agreeable?

Mr. Constine: Oh, yes, your Honor.

Mr. Riordan: Would that be the same date for Mr. Ong?

Mr. Constine: I don't know if counsel wishes this to be referred to the probation officer or not, because that has been done in Mr. Yep's case but not in Mr. Ong's case.

Mr. Riordan: I was going to make a motion, your Honor, and I am not absolutely sure of the procedure, now.

Mr. Constine: You won't prejudice yourself by asking for probation.

Mr. Riordan: I see. Then I will ask for a probationary report.

The Court: So that we may have a full understanding of that, I will refer to the Probation Department for a pre-sentence report.

Mr. Riordan: I see, your Honor; and I still have the opportunity to make my proper motions at the proper time?

The Court: You can make it at any time before that.

Mr. Riordan: Before the 7th of May; is that correct? [220]

The Court: Yes.

Mr. Riordan: And I would also ask the Court at this time to allow my client, Mr. Ong, to remain

on bail, in view of the fact that he has a wife and two children, pending the making of the motions, if at all possible.

Mr. Constine: I believe he is on what? \$5,000 bail now?

Mr. Riordan: Yes, that is correct.

Mr. Constine: We will submit that to your Honor in view of his prior conviction and this conviction now.

The Court: Do you resist this application?

Mr. Constine: Well, I just don't know too much about it. I could ask Mr. Wu. Mr. Wu, do you have any indication that he might flee? Does he own his home here?

Mr. Wu: Yes, he does.

The Court: He might make a good guess.

Mr. Constine: He is on a substantial bond, your Honor.

The Court: In any event, my own rule is that these defendants after they have had a full opportunity to be heard go into custody. That will be the order.

Mr. Riordan: To go into custody, your Honor?

The Court: Yes; not only this case but all cases I have tried, unless there is some showing made. And from what I have observed here I can't conceive of an opportunity for you to make a legal showing that would preclude me from ordering this defendant into custody. I say that kindly. [221]

If you wish to have some other break before that, or any time you wish.

Mr. Riordan: May 7th—I am just making a

quick calculation—is a week from Tuesday, is that correct—a week from Monday, I believe.

Mr. Constine: If that date isn't agreeable with counsel, we can come before your Honor in the meantime.

Mr. Riordan: Can we have it next Thursday, whatever date that would be?

The Court: Certainly. The 3rd. You can make the necessary motions to complete your record.

Mr. Riordan: Thank you.

Mr. Ringole: My presence will not be necessary?

Mr. Constine: You are on on May 7th.

The Court: Very well. You are to be here with your client on May 7th.

Mr. Ringole: My client will be here. He is in custody, your Honor.

The Court: It will be necessary for you to be here.

Mr. Ringole: Oh, yes. [222]

May 3rd, 1956

The Clerk: United States versus Yep and Ong, hearings on motions.

Mr. Constine: Ready for the United States, your Honor.

Mr. Riordan: Ready for the defendant Ong, your Honor. If it please the Court, at this time I would like to make an Ex Parte motion in relation to a new trial on behalf of the defendant Ong. I will proceed and make this very brief, your Honor.

The Court: Did you file your petition?

Mr. Riordan: No, I did not.

The Court: Why not?

Mr. Riordan: I was under the impression that I could do this *Ex Parte*, in view of the fact that at the time, after the finding was made——

The Court: I think it would be better if we have a proper record. There is a case on trial here. I will give you time to do that.

Mr. Constine: May I make an inquiry? The Probation Office has my file. What date was set for judgment? I believe he has to make the motion for a new trial prior to the sentence.

Mr. Riordan: Today is the 3rd. The 7th is when? I believe I could do it this afternoon and make the motion on the 7th. It would not be sufficient for the five days. [223]

Mr. Constine: I think that is the problem. I have a jury trial commencing Monday. Perhaps we will have to continue the judgment anyway in that case because the Probation Officer has not yet prepared his report.

The Court: Suppose it goes over a week?

Mr. Riordan: Very well, your Honor.

Mr. Constine: That is agreeable.

The Court: I think that is the best thing to do.

Mr. Constine: May the judgments be continued?

The Court: Also the case that is on for the 7th will go to the same day.

The Clerk: To May 10th for judgment and the hearing of motions in the Yep and Ong case.

The Court: Is that agreeable?

Mr. Riordan: Very well. [224]

May 10th, 1956

Mr. Constine: Now, your Honor, this is the case of the United States versus Yep and Ong that was tried before your Honor, and Yep's judgment is now continued to the 17th, as I understand it.

The Court: Yes.

Mr. Constine: So the only case before your Honor now is Mr. Ong. Counsel has made a motion for a new trial. Mr. Ong is charged alone in this case and has no connection with the other cases.

Mr. Riordan: I am a little confused, your Honor; I have heard all this——

The Court: If you are confused, all you have got to do is to inquire.

Mr. Riordan: That's what I am going to try to do, your Honor. Is it my understanding now that this matter, this case of 34979, we are going to proceed on our motion for a new trial, but that there will be no sentencing?

Mr. Constine: No, as I understand it Yep individually has been continued until May 17th for judgment in all three cases; the other cases are going forward.

Mr. Riordan: I see.

The Court: Anything else you are in doubt about?

Mr. Riordan: I hope not, your Honor. [225]

The Court: If you are, just assert yourself.

Mr. Riordan: Yes, your Honor.

The Court: All right. Proceed.

Mr. Riordan: If it please the Court, I desire at this time to make a motion for a new trial. My

motion for a new trial has been filed on May 4th, 1956, a copy of the same has been served upon the government, together with a notice of the same.

The grounds upon which I presently make my motion are, one, the Court erred in denying my motion for acquittal at the conclusion of the evidence; two, the verdict was contrary to the weight of the evidence; three, the verdict is not supported by substantial evidence; four, the Court erred in admitting testimony of all government witnesses to which objections were made.

I will basically, your Honor, summarize all these various objections by referring and crystallizing, if I can, my argument about insufficiency of the evidence to justify a verdict of guilty in this matter. I am going to be very brief, your Honor, I am going to cite——

The Court: We are very fortunate; we have considerable time, so don't hurry.

Mr. Riordan: Very well, your Honor. I am going to cite one case, the case of *People vs. Dire*, which I argued before to this Court, or discussed in my argument with this Court on [226] my motion for judgment of acquittal and also——

The Court: What is that citation?

Mr. Riordan: *People vs. Dire*, 332 U. S. 581; and also, your Honor, I am going to bring in another case. The other case I will argue, your Honor, which is new as far as my argument is concerned which I discovered last night, the case of *Rent vs. The United States*, 209 U. S. 893.

The Court: I don't know whether Mr. Constine is familiar with those cases or not.

Mr. Constine: Your Honor, we were not provided with any citation of the cases. However, I should state to your Honor the law concerning this matter was fully argued before your Honor.

The Court: No, it wasn't fully argued in relation to admissibility of evidence. I indicated to you, if my memory serves me, and if I am in error you correct me, I told you to crystallize your problem and present your case; you recall that?

Mr. Riordan: I think at the time I was making a motion.

The Court: Do you agree with it generally? Is that true?

Mr. Riordan: That's right, your Honor, at the time I was making a motion for judgment of acquittal.

The Court: Now, in order to preserve this record you will have to make a proper record.

Mr. Riordan: Yes, your Honor. [227]

The Court: And point it out.

Mr. Riordan: Yes, your Honor. Basically, your Honor, the facts as were presented by the Government in relation to the 1st day of February, 1956, were that Yep and Mr. Wu, the agent for the Government, met in the A.M.; that Mr. Wu testified that Mr. Yep stated he was going to see a contact of his; that he left Mr. Wu's apartment and that from there he drove to the residence of Mr. Johnny Ong; that he was in Mr. Ong's residence for a time and then he left; that Mr. Yep and Mr. Wu

met sometime in that day and that approximately 3:55 Mr. Yep and Mr. Ong met in Chinatown in San Francisco and they drove around in an automobile; that subsequent thereto Mr. Yep and Mr. Wu met at Tompkins'.

Mr. Yep stated he could not or did not have any narcotics for sale at that time, however he was making arrangements to procure the same and that he would probably be able to effect a sale that evening; that around nine o'clock Mr. Yep and Mr. Ong were seen together in the vicinity of Mason and Jackson in the City and County of San Francisco; that Mr. Ong left and subsequently came back to the same place around nine o'clock—or, rather, ten o'clock. In the interim between nine o'clock and ten o'clock Mr. Yep remained in the vicinity of Jackson and Mason; that at that time Mr. Yep was sitting in his car for about fifteen minutes, he would get out, and there was also testimony, your Honor, he entered a drug store in the vicinity [228] of Mason and Jackson; that he made a phone call at that time. Mr. Wu testified that approximately, I believe it was, 9:20 or 9:30, Mr. Wu testified, that he received a telephone call from Mr. Yep stating that he would be over to deliver narcotics that evening; that at approximately ten o'clock, as I stated, Mr. Ong came back to Mason and Jackson Street in San Francisco; that he was seen walking in carrying a baby in his arms; that Mr. Yep and Mr. Ong walked into an apartment house at 1003 Jackson Street. The agents testified to the fact that Mr. Yep remained in this particu-

lar building for a minute or less, and then he came out of the bulding, he drove up to Mr. Wu's apartment at approximately 10:15. He made a sale. That upon leaving he stated words to the effect that, "Well, I must go any see the man," and Mr. Yep left Mr. Wu's apartment, drove back to Mason and Jackson Street, that after Mr. Yep's arrival at Mason and Jackson Street Mr. Ong got into the car with Mr. Yep and they drove around.

There was also testimony, your Honor, that on the 7th of February Mr. Yep stated to Mr. Wu that a man who was dealing was about to purchase a car. I believe my recollection indicates—or at least indicates to me—that Mr. Wu stated that Mr. Yep did not indicate to him that the man who was his contact on that particular sale or sales, that Mr. Yep and Mr. Wu were engaged, was the individual purchasing a Cadillac automobile. [229]

There was some testimony that Mr. Wu and Mr. Yep met at Gino's; that Mr. Yep said, "Well, I'm"—after dinner—that "We are—I have to go join my connection." Subsequent thereto he went to a social club on Spofford Street or Alley in San Francisco; that in this particular club there were apparently several people, rather densely populated portion of San Francisco; that after going into the Spofford Social Club Mr. Yep and Mr. Ong were seen together—I believe it was standing next to Mr. Yep's automobile.

On February 13th Mr. Yep stated [230] that a contact of his was a man who was a big gambler around San Francisco, a man who had formerly

been charged as a bookie, and the case was dismissed; that also this man had worked in a cannery some time in the past.

Then on February 17, basically the matters that were introduced against Mr. Ong was that Mr. Yep in a conversation with Mr. Woo stated that a connection of his was willing to put up a Cadillac automobile as security to assure Mr. Woo that a particular purchase would be effected as to quality and the rest.

Now, there was also some testimony, your Honor, in which there was a conflict on the record. However, I don't believe that it is particularly applicable to this argument. It was that on February 7 Mr. Woo—or rather Mr. Ong and Mr. Yep were seen at a racetrack, I believe it was Bay Meadows in San Mateo County, State of California, and that they were seen talking to each other; that at some time thereafter Mr. Woo left the racetrack and he went to Mr. Ong's home.

Now, if it please the Court, I submit that these hearsay statements of Mr. Yep's that were introduced basically through Mr. Woo are matters which are of such a general scope, identification of a man without a name, an identification by using a rather general term of "a contact." A contact, in its general term, can mean an electrical contact, [231] a contact of a man shaking hands, a contact within a business field; it is a matter which, when taken in light of a narcotic charge, takes a particular meaning. Apparently it is a contact from which a man purchases narcotic goods.

I submit, your Honor, that any conversation Mr. Yep ever had with Mr. Woo that the word always used in referring to the suppliers was always that of a contact, and that in no case did any of the testimony which was allowed and introduced by the government through Mr. Woo constitute a proper identification or any means by which the court could assume that the party to whom Mr. Yep was referring as his contact, by taking in its full and four-square consideration of this case with the same connected Mr. Ong up with Mr. Yep in the sale of narcotics.

When Mr. Yep allegedly identified his contact here in San Francisco as an individual who owned a Cadillac automobile, as an individual who was a gambler, as an individual who was previously charged as a bookie and that the matter was dismissed, as a man who had formerly worked in a cannery, I submit that that identification, your Honor, could apply to thousands and thousands of people in this United States, and undoubtedly thousands within the State of California, and probably at least one thousand people within the city and county of San Francisco; that the people who own Cadillacs are rather numerous here in San Francisco; the people who [232] are gamblers are rather numerous in San Francisco. Perhaps we could even assume that people who are big gamblers also own Cadillacs, and the people who are not gamblers also own Cadillacs, and have worked in canneries. There was no establishment of any conspiracy prior to the introduction of these various

hearsay statements which would identify Mr. Ong with Mr. Yep; that none of the statements as outlined to the court at the present time could be associated as statements which were in furtherance of a conspiracy at all.

Now, basically, your Honor, I feel that we have an instance in which, during the 1st day of February, 1956, we have Mr. Ong and Mr. Yep at least four times they are seen together, they fit the time, the incident, the first alleged or supposedly alleged meeting was when Mr. Yep drove to the home of Mr. Ong. My recollection is that there was no testimony at all to the fact that Mr. Ong was in this home, no reason to assume that he necessarily was in this home. However, taking the five meetings of this particular defendant, your Honor, I believe we can say that in view of the testimony of Mr. Ong that "Mr. Yep and I have been friends for a long time" that there is nothing particularly unusual in two people meeting five times in one day. Assuming that Mr. Yep made a sale on the 1st day of February, 1956, and again accepting the fact that Mr. Ong and Mr. Yep met five times during the course of this day, that it is obvious that close or near to one [233] of these meetings, or even two of these meetings the sale must have occurred, that fact alone does not give rise to an inference of guilt on the part of Mr. Ong in this matter. The meetings alone are not sufficient, if it please the court, upon which a finding of guilty in relation to Mr. Ong can be based.

Again I cite *The People Vs. Di Re* 332 U. S. 581.

I will briefly outline the fact of that case as I believe they are pertinent to this argument.

A federal agent was informed that "A" was to sell "B" ration stamps at the spot "X." An agent and police officer drove to place "X" and found "B" sitting in the back seat. Now "B" is the party who is to purchase the stamps. "B" was sitting in the back seat and he was holding ration stamps. "B" said he had obtained the same from "A." "A" and Di Re were sitting in the front seat. On a search of Mr. Di Re several counterfeit stamps were found on his person.

The court, in discussing the conspiracy in this particular case, said that the presence of Di Re in the car did not authorize an instance of participation by Di Re in the sale of coupons from "A" to "B."

It states further, your Honor, and this is a case in which many conspiracy cases refer to and seemingly the quote that they take out of this particular Di Re case rather constantly is the fact that that presumptions are not to be [234] lightly indulged in from mere meetings. The cases subsequent to the Di Re case after that particular statement refer to *The People Vs. Di Re*.

I have another case, your Honor, I stated I would refer to at the present time. That is the case of *Rent Vs. the United States*, and the citation I have here is 209 U. S. 893. I want to check to see that I have it correct, your Honor.

That should have been 209 Federal 2d rather than U. S. 893.

In that case, your Honor, the facts are a little involved; I tried to break them down as simply as I possibly could. I have used the terms A, B, and C. One of the matters that leads to confusion in a discussion of this case is that the court merely states that A, B and C were indicted as co-defendants and that C was not tried. Now, C apparently was a rather large actor within this case. However, they discussed this case only in the light of A and B, which in reality their names are "Rent" being A, my discussion and B being one Currey.

Now, A, B and C were indicted for a conspiracy in relation to narcotics. At about 9:30 p.m., A, B and C walked to a corner. B and C waited on the corner and A was seen to go to an auto, bend down and light a cigarette.

Now, the agent and the officer who testified in this matter stated that in their opinion from his manner of smoking it appeared that A was smoking a marijuana cigarette. [235] Now, A walked back to the corner where B and C were standing. The agents stayed in the vicinity of this first act. At about eleven p.m. the officer, one of the officers, who was surveilling this position, was informed that someone had placed a marijuana cigarette near his car. He went over to the car and he searched about the car and he found a marijuana cigarette in the grass close to the car. He picked up the cigarette and he marked it by putting his name on the cigarette and also the date and the place where it was found.

At about 11:50 A, B and C, the original three

actors and one D came up to this car. A entered the car again and B, C and D stayed outside. B then picked up the cigarette, he lit it and began to smoke it. The agents came up and said no one move and at that time they saw B slip something over the top of the car. They arrested the four gentlemen and then went out and they searched the area of the street right next to the automobile and there they found this marked cigarette in the street.

After the arrest, A and B were searched. From A's pocket they found a few particles of marijuana. From B's pocket they found a small piece of marijuana. The court in discussing this case stated that the evidence as to a conspiracy was clearly insufficient. The only evidence was that A and B possessed marijuana, and the fact that they were walking in the company of each other, stating, your Honor, [236] that the gist of conspiracy is agreement. To support the charge, intent must be shown. The walking together is not sufficient. Presumptions of guilt are not lightly to be indulged in from mere meetings. The inference reasonably to be drawn from the evidence must not only be consistent with this guilt but inconsistent with every reasonable hypothesis of innocence. [237]

Now, your Honor, apparently the government's theory of this case in relation to Ong was that approximately 9:00 o'clock on February 1 Mr. Yep and Mr. Ong met; that Mr. Yep stayed in the vicinity of Jackson and Mason; that Mr. Ong left and was gone for approximately an hour. Mr. Ong

takes the stand, he says "I recall meeting Mr. Yep, he went to an apartment house, watched TV for a while, we all left the apartment house, I got to the corner of Jackson and Mason, my little boy needed a haircut, I took him down to the barber shop and I returned at approximately 10 o'clock at which time I walked into the apartment house at 1003 Jackson Street; my recollection is that Mr. Yep came in and he also went up to the apartment house. He left sometime thereafter, the exact time I don't know, because I didn't see him."

Now, the government would have you believe, your Honor, that it was when Mr. Ong returned at 10 o'clock that at that time he somewhere had picked up heroin and delivered the same to Mr. Yep. I submit, your Honor, that the evidence and the fact of Mr. Ong's leaving and Mr. Yep's remaining in the vicinity at this particular time and Mr. Ong's nearness to the event of sale and their meeting was an act which was highly inconsistent, that the acts were as consistent, rather, with innocence as with guilt.

There is also a very strong point, I think, for the Court's consideration at this time, your Honor, as I argued in [238] my closing statement, that during this period from 9 o'clock until 10 o'clock when Mr. Ong states he went to get a haircut for his little boy that the government agents apparently had been tailing Mr. Ong for a long time, that there were several agents about the vicinity at this time, that apparently from Mr. Woo they had information that Mr. Yep was to make a sale on that par-

ticular night and yet there was no evidence, there was no testimony by any government agent that despite the fact that they had followed Mr. Ong during the rest of the day that from 9 o'clock until 10 o'clock they let him go freely and they would have to assume that during this time when no surveillance, no suspicion was placed upon Mr. Ong sufficient to have government agents following him that he engaged in some nefarious traffic in narcotics.

It was stated further, your Honor, in the case of *Rent Vs. the United States*, about five lines from the bottom, that from B's possession of the marijuana cigarette to constitute him a transferee of marijuana required to pay the transfer tax the possession must have been with guilty knowledge or intent. This is recognized in the indictment which charges B's conduct to have unlawfully, knowingly and feloniously committed. The one small piece of marijuana found in the dustings of Curry's pocket might well have dropped from a match box borrowed from an associate or otherwise accidentally found its way into his pocket. Curry's possession of one [239] cigarette was a mere fleeting possession not inconsistent with honest intention or mere curiosity, and his throwing the cigarette away upon being ordered to stop is not in our opinion, substantial evidence of a guilty knowledge or intent. Criminal intent is a *sine qua non* of the criminal responsibility.

I also have a quote, Your Honor, from the case of *United States vs. Carengella*, 198 Federal 2nd,

Page 3, in which they were discussing a conspiracy charge—I am just taking this out of context, Your Honor—that association with guilty men may create suspicion, but is not evidence of sufficient weight to convict under the statute in question.

Now, I would like to call the Court's attention again that there was a conflict in the evidence in relation to the activities that occurred on February 7, 1956. You will recall that this was the date that Mr. Ong testified that he had purchased an automobile. Mr. Ong stated: "I don't recall going down to the track that day." He says on that particular date apparently the trotters were running. "I have never been to Bay Meadows this year while the trotters were running."

You also heard testimony from the government agent, the man who sold the automobile to Mr. Ong, I believe his name is Tom, Tom Demitty, and he stated, I believe, Your Honor, that that it was his recollection he sold the car sometime after [240] lunch. He said, "I think it was sometime between 2 and 4 o'clock." He said it took quite a long time to negotiate this sale. He said, "We started around 2 o'clock, finished around, sometime around—" well, he wasn't too definite on it, but said it could have been close to four. I submit, Your Honor, that there is no intention, I don't believe, on the part of any government agent here, and I do not attempt to say so to falsify a fact here of identification, however, you must take the evidence as it was presented in its proper light, and the fact that these agents say they followed Mr. Yep and saw him go and talk to

several people at the race track, some of them said, well, we had seen Mr. Ong before. But there is a possibility there, Your Honor, which can be reasonably deduced from the evidence and the conflict of the evidence presented that there was a misidentification of Mr. Ong, that they saw someone who appeared to be Mr. Ong.

I submit, Your Honor, that on the other matters, and the meetings and the various theories that were presented before the Court that the same conflict exists and that there was either a misinterpretation or misidentification by some of the agents involved here.

The basic position and the basic matter that the government has in this matter, Your Honor, is the fact that there were several meetings by Mr. Ong and Mr. Yep; that several times Mr. Yep stated to Mr. Woo that I am going to [241] contact, or my contact is doing an act, the act of purchasing an automobile; not my contact in this sale, but a contact in San Francisco for purchasing an automobile; that on the same day or about the same date Mr. Ong purchased a Cadillac automobile; that none of these statements were matters that were in furtherance of the conspiracy; that at the time they were introduced by the government there was no corpus delicti established, that there was no proper identification or any reasonable grounds to believe, Your Honor, that Mr. Yep was referring to Mr. Ong when he was making these statements; that the fact that Mr. Yep had informed Mr. Woo on the 17th day of February that a local contact of his was

willing to put up as security a 1955 Cadillac automobile is a mere circumstance which the Court considers in view of the fact that simply because Mr. Ong also had a 1955 Cadillac at that time that he was the contact who was to put up this security.

I submit, Your Honor, that the government's case presented no substantial evidence upon which a conviction could be found.

Mr. Constine: May it please Your Honor, I have a very brief statement. Counsel has presented no new facts whatsoever other than the ones he argued originally before Your Honor on a motion for acquittal. In fact, he has not outlined the evidence in detail as he did then. I am sure that he has not intentionally overlooked the facts in this case; [242] he is to be complimented for his zeal in representing his client; but the facts as Mr. Riordan has explained them are not entirely facts which were produced by the government in this case.

There was not only a meeting between this defendant, a series of meetings between the two defendants over a period of ten days, they were under constant surveillance by the agents. Mr. Yep, the man who sits before Your Honor, very definitely and accurately and acutely identified Mr. Ong as his source of narcotics. And these are the important things which counsel did not mention, when Mr. Ong was accused of engaging in this illegal narcotic traffic he remained silent, made no explanation, and Your Honor, he admitted quite freely from the stand on examination and cross-examination that he was doing this to protect Mr. Yep.

Now, the defendant was involved in prior narcotic difficulties, stands convicted of a prior felony, and I think the most important thing is that when he testified before Your Honor, Your Honor stated at the time Your Honor convicted him that Your Honor could not believe the testimony of Mr. Ong; that if Mr. Ong was going to be believed then all the witnesses of the government and all the agents would have to be disbelieved, and Your Honor stated that you did not believe Mr. Ong was telling the truth.

Now, counsel cites cases with which we have no quarrel; [243] they have no applicability here, they involve one meeting of a man at a certain time or place. These agents saw them meet on innumerable occasions over periods of at least ten days, and I think that the record is abundantly clear that there was not only convincing evidence beyond a reasonable doubt, but there was overwhelming evidence beyond a reasonable doubt. In fact, the defendant Ong corroborated much of the evidence that the agents testified to except that he denied he was involved in narcotics. He said that he was protecting the defendant Yep. I think the record in this case is a substantial record of a conspiracy between these two defendants, the dealings and the conversations with one another, and I submit to you that counsel has argued the same matters that he argued when Your Honor denied the prior motion, and I ask that the motion for a new trial be denied. This defendant was given a fair trial, he took the stand

himself, he testified, and Your Honor disbelieved him.

The Court: Motion for a new trial will have to be denied.

Ready for judgment?

The Defendant: Yes, sir.

The Court: Do you know any reason, legal or otherwise why sentence should not be imposed in this case yourself?

The Defendant: I don't know, sir. [244]

The Court: You don't know any reason?

Well, this record discloses that you were in this same difficulty in relation to this poison before. For that reason the court has to take that into account in sentencing you. You understand that, do you?

The Defendant: Yes, sir.

The Court: You are now ready for sentence?

The Defendant: Yes, sir.

The Court: Now, we have counts one and two before the court?

Mr. Constine: No, Your Honor, this defendant was just named in the conspiracy count and that was the count under which he was convicted. The other counts involve Mr. Yep. This defendant is just convicted of count five of the indictment—pardon me, count three of the indictment.

The Court: What is the penalty on that case?

Mr. Constine: Imprisonment for not less than two nor more than five years, Your Honor.

The Court: Keeping in mind that you have been in court before and sentenced on virtually the same charge for dealing in these narcotics you can con-

sider yourself very fortunate for I would give you the limit if there was any other matter before me for the reason that a young man like you has no business at all to engage in this sort of thing.

It is the sentence of the court and the judgment of the [245] law that you be taken into the custody of Attorney-General or one of his legal representatives to be imprisoned for a period of five years.

Anything further you wish to say?

Mr. Constine: May a nominal fine be assessed?

The Court: Nominal fine of \$1.00. That's all.

[Endorsed]: Filed June 25, 1956. [246]

[Endorsed]: No. 15178. United States Court of Appeals for the Ninth Circuit. Ong Way Jong, alias Johnny Ong and Wee Zee Yep, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: June 29, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15,178

ONG WAY JONG, alias JOHNNY ONG,
Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

DESIGNATION OF POINTS RELIED UPON
BY APPELLANT ONG WAY JONG

Now comes Ong Way Jong, alias Johnny Ong, the appellant above named, who has heretofore, to wit, on the 17th day of May 1956 appealed to the United States Court of Appeals for the Ninth Circuit, from the judgment of conviction given, made and entered against him on the 10th day of May 1956, in a cause depending in the District Court of the United States for the Northern District of California, Southern Division, and numbered therein 34979, the record on which appeal was duly filed in this Court the 28th day of June 1956, as from the record aforesaid duly filed and docketed in the office of the Clerk of this Court fully and at large appears, and pursuant to the standing rules of this Court files his designation and specification of the points upon which he, the said appellant, will rely upon said appeal for the reversal of the judgment aforesaid:

1. The evidence was insufficient to justify the judgment of conviction;

a) The corpus delicti, that is, the conspiracy itself, was not established;

b) There was no competent evidence to establish the existence of any conspiracy between appellant and Wee Zee Yep;

c) The only evidence of any participation of appellant with any transaction in narcotics consisted of hearsay acts and declarations of the alleged co-conspirator, which were incompetent to establish the conspiracy, and which were not binding upon the appellant.

2. The District Court erred in denying the motions of appellant for a judgment of acquittal.

3. The District Court erred in denying appellant's motion for a new trial.

4. The trial court erred in admitting, over the objection of appellant, the hearsay testimony of Milton K. Wu as to his dealings and conversations with the alleged co-conspirator, Wee Zee Yep, all of which were out of the presence of the appellant, whom the witness testified that he never saw at any time prior to his arrest.

5. The trial court erred in admitting in evidence alleged accusatory statements made in the presence of the appellant as testified to by the witness Hipkins.

6. The trial court erred in admitting in evidence testimony of the witness Wolsky to the effect that while appellant was under arrest he remained silent

in the face of an accusatory statement by the arresting officers.

7. The Government officers were agents provocateur and the conviction cannot be sustained.

Dated: July 5, 1956.

HERRON AND WINN,
/s/ By FRED R. WINN,
Attorneys for Appellant

[Endorsed]: Filed July 6, 1956. Paul P. O'Brien,
Clerk.

No. 15,178

IN THE

United States Court of Appeals
For the Ninth Circuit

ONG WAY JONG, alias JOHNNY ONG,	}	<i>Appellant,</i>
vs.		
UNITED STATES OF AMERICA,		

APPELLANT'S OPENING BRIEF.

HERRON & WINN,
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FILED

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No. 15,178

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ONG WAY JONG, alias JOHNNY ONG,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

The Grand Jury of the Northern District of California presented an indictment against appellant and one Wee Zee Yep. The indictment contains three counts, but we ignore the first and second, as they are against Wee Zee Yep alone. The third Court charges the two defendants under Section 371 of Title 18, United States Code (the conspiracy statute) with knowingly and wilfully conspiring together "to sell, dispense and distribute, not in or from the original stamped packages, quantities of narcotic drugs, to-wit, heroin, in violation of Sections 4704 and 7237 of Title 26, United States Code, and to conceal and facilitate the concealment and transportation of quantities of narcotic drugs, to-wit, heroin, which had been

imported into the United States of America contrary to law in violation of Section 174 of Title 21, United States Code.” (TR 4.)

Four overt acts were alleged: (1) on or about February 1, 1956, at San Francisco, California, defendant Wee Zee Yep sold a quantity of heroin for the sum of \$600; (2) on or about February 1, 1956, defendant Wee Zee Yep entered a residence at 83 Winfield Street, San Francisco, California; (3) on or about February 1, 1956, in the City and County of San Francisco, defendants Wee Zee Yep and Ong Way Jong, alias Johnny Ong, traveled together in a 1951 Cadillac coupe bearing California License No. CKC 040; (4) on or about February 1, 1956, defendant Wee Zee Yep met defendant Ong Way Jong, alias Johnny Ong, at 1003 Jackson Street, San Francisco, California. (TR 5.)

This indictment was returned March 7, 1956, and appellant pleaded not guilty thereto on March 8. A jury having been waived, the cause came on to trial on April 25 and 26, 1956, and both defendants were found guilty as charged. (TR 213). Appellant filed a motion for a new trial on May 4, which was denied May 10, 1956, and appellant was sentenced to five years imprisonment and a fine of \$1. He filed his notice of appeal to this Court on May 17, and has brought up the complete record and all the proceedings and evidence to this Court.

JURISDICTIONAL STATEMENT.

(1) **The statutory provisions believed to sustain the jurisdiction.**

(a) **The jurisdiction of the District Court.** Title 18, Section 3231, United States Code, which provides:

“The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.”

Also, the Constitution of the United States, Amendment VI:

“In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed.”

(b) **The jurisdiction of this Court upon appeal to review the judgment in question.** Section 1291, Title 28, United States Code provides:

“The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.”

Section 1294 of Title 28:

“Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeal as follows:

(1) From a district court of the United States to a court of appeals for the circuit embracing the district.”

- (2) The pleadings necessary to show the existence of the jurisdictions.

The indictment. (TR 3.)

- (3) The facts disclosing the basis upon which it is contended that the District Court had jurisdiction and that this Court has jurisdiction upon appeal to review the judgment in question.

These facts are set forth at the outset of this brief, and a restatement of the indictment, the plea and the judgment and orders of the District Court are omitted in the interest of brevity.

ABSTRACT OF THE CASE.

The cause, as heretofore stated, came on to trial the 25th day of April, 1956, before Honorable Michael J. Roche, District Judge, sitting without a jury, a trial by jury having been waived by both defendants. Thereupon counsel for the Government made the following opening statement:

“Mr. Constine. May it please Your Honor, inasmuch as this is a conspiracy case plus the substantive offenses, I wish to make a brief opening statement of what the Government intends to prove.

This indictment was returned by the Grand Jury in three counts. It charges the defendant Yep with the transfer of a quantity of heroin on February 1st of this year; the second count charges him with the possession of that heroin, while the third count charges the defendant Yep and the defendant Ong with conspiracy to violate the narcotic statutes.

The defendant Yep has pled guilty to the possession of the heroin. However, he has pled not guilty to the transfer of that heroin, and he and Ong has pled not guilty to the conspiracy count.

I might say that this will be a relatively simple case. Much of the proof in this particular indictment will center around the transaction of February 1st. The primary witness, Your Honor, for the Government will be Wilton Wu, who sits at my left, a United States Treasury agent who in this case operated in an undercover capacity pretending to be a narcotic purchaser from Denver, Colorado.

The evidence that will be introduced will show that the defendant Yep is a narcotic peddler of some substance, having been selling heroin in this community in large quantities for approximately four years.

The proof will show that he had a number of sources for his heroin, one source Caucasian seaman who sailed between Hong Kong and the United States. I might state, just as an aside, that that was the case that was before Your Honor yesterday—the activities of this defendant and the seaman, Mr. Houk, who I might say pled guilty before Your Honor yesterday. However, the defendant had other sources of narcotics within this community, and it is the Government's contention, of course, that one of these other sources was the defendant Johnny Ong.

In the middle of January Mr. Wu, in the undercover capacity, we will show met the defendant Yep and negotiated for a sale of narcotics, which actually took place. Yep explained that

his seaman friend, the man that was before Your Honor yesterday, was still out at sea and not available, and, therefore, he had to turn to another connection, a good friend of his that he had in San Francisco. We will show that other connection was the defendant Johnny Ong.

On January 23rd we will show that Mr. Wu purchased from Mr. Yep two ounces of heroin. On February 1st we will show that Mr. Wu purchased another ounce of heroin from Mr. Yep, and it is on this transaction that the agents observed Mr. Yep and Mr. Ong in the conspiracy as both defendants were under constant surveillance for the most part during that day, February 1st.

Now the remaining link—the proof will show that the defendant Yep identified the defendant Johnny Ong as his connection, as one of his sources of narcotics, and he described him as an unemployed, ex-bookie, gambler, who owned a 1955 Cadillac and who had no job at the particular time.

I say that because the Government will show that it was this 1955 Cadillac that was offered by the defendant Yep as security in the narcotic transaction with Mr. Wu. We will also show that after an additional sale when both defendants were apprehended and arrested, the defendant Ong was confronted with the fact that the agents believed him to be involved in this narcotic transaction on February 1st, they accused him of delivering the narcotics to Mr. Yep, and in the light of this accusation the defendant remained silent and made no statement or explanation at all, although he did admit that he had had no job for over a year and was unemployed.

There are a number of agents that the Government will call in this case, Your Honor. It will be something that can be compared to a jigsaw puzzle. Each agent can only testify to what he saw or what he observed; it will not be until all the agents testify before Your Honor that the complete picture of the defendant Ong's guilt and the defendant Yep's guilt will be made clear." (TR 24-27.)

Thereupon counsel for defendant Ong moved for a dismissal and for a judgment of acquittal on the basis of the Government's opening statement upon the ground that, according to the said statement, the defendant Ong merely met the defendant Yep on various occasions, and that under the authorities a mere meeting standing alone does not give rise to even an inference of conspiracy, and that hearsay evidence alone was relied upon by the Government to connect the defendant Ong with the transactions involved. (TR 27.) The Court denied the said motion, to which ruling counsel for the defendant Ong duly objected.

WILLIAM J. GOWANS, called as a witness on behalf of the Government and being first duly sworn, testified:

I am a chemist employed by the United States Treasury Department, and have been so employed for fifteen months. I worked as an analytical chemist for approximately ten years. (TR 30.) Heroin is a narcotic. It is a derivative of opium. I have brought with me two exhibits at the request of the United States

Attorney. (Thereupon wo packets were marked for identification as Government's Exhibits 1 and 2.) I received Exhibit No. 1 on January 24, 1956, and Exhibit No. 2 on February 2, 1956, from Agent Wu of the Bureau of Narcotics. It contains 70 per cent heroin. Exhibit 2 contains 1 ounce, 36 grains of heroin. The packets were sealed in my presence. I broke them when I performed the analysis and then I resealed them. (TR 33.)

MILTON K. WU, called on behalf of the Government, testified:

I am a Treasury Agent with the Bureau of Narcotics, and have been employed in that capacity the past year. I am now assigned to the San Francisco Field Office of the Bureau of Narcotics. I know the defendant who sits at the right of the United States Attorney (the defendant Yep) by the name of Rocky. (RT 37.)

Thereupon the following proceedings occurred:

“Q. Did you have a conversation with him?

A. Yes, I did.

The Court. Time and place.

Mr. Constine. Pardon me, Your Honor?

The Court. Time and place. Let us fix that.

Mr. Constine. I will.

Q. What time was that that you had the conversation with him?

A. About 7 o'clock.

The Court. And the date?

Mr. Constine. January 15th, Your Honor.

Q. In the Pagoda Bar, is that correct?

Mr. Riordan. If it please the Court, in order that I won't have to constantly interrupt, I want

to object to all the past testimony and any further testimony by Mr. Wu along this line as to his meeting with Mr. Rocky Yep and any conversation he had with Mr. Yep on behalf of my client.

Mr. Constine. It is understood you have an objection to the whole series of transactions.

Mr. Riordan. That is right. So I will not interrupt.

The Court. The objection is overruled."

The witness (continuing): No one besides myself was present during the conversation. He asked me what I was looking for and I said, "Well, let's go up to my apartment and we can talk better up there." So we walked to my car and proceeded up to my apartment at 225 Chestnut Street. No one was present besides Mr. Yep and myself. I asked him about the sample that I received and why it was so small, and he claimed he didn't open it to look at the quantity. And I asked him what happened to my shipment of narcotics that I was promised. He said he sold it. However, he was expecting another shipment within three weeks or so; that his connection was a white seaman working on a freighter which was due in about three weeks. (Tr. 39.) He assured me I will have first option on that shipment—I questioned him as to the reliability of his connection, and he assured me that he had other connections in the city; that he can always purchase narcotics for me. So I ordered—I told him to get me two ounces to tide me over until the ship came in, and he agreed and said he will locate some for me. I saw the defendant Yep again on Jan-

uary 23, 1956 at the same place where I mentioned before. That was my apartment. That was approximately 8:30 in the evening. (Tr. 40.) No one else was present in the immediate room. Agent Wolski was in a connecting room monitoring our vocal activities. Mr. Yep told me that he has made arrangement to deliver me two ounces and he is ready to go, and that he expected to contact his contact approximately 9:15 or so. So he left about that hour. He mentioned his seaman connection is still coming in, due in any time. He says that he has to make other—his other connection that is locally to get the stuff. He didn't use the word "heroin"; in the trade the word "stuff" means the narcotics. Mr. Yep left at that time and returned approximately an hour later and he delivered me two ounces of narcotics. (Tr. 42.) I paid him \$1100. That is the defendant Rocky Yep. Government's Exhibit 1 for identification is the package that I sealed myself and my initials are on the packet. (Tr. 43.) These are the two packages I received. I identify them by my initials on them and that date.

Thereupon the following proceedings occurred:

"Mr. Riordan. Yes, but I don't know if I mentioned it before—I would like to now add the additional objection to all this testimony as being hearsay against my client.

The Court. The objection will be overruled.

Mr. Riordan. And it is understood that that objection runs to the rest of this testimony?

Mr. Constine. Yes, that is agreeable with me."

The witness. I told him I was leaving town; that I would contact him when I get back in town again.

He said all right. That was January 23. (TR 44.) On February 1st, I called the defendant Yep in the morning and told him I was back in town. So we agreed to meet in my apartment later on in that afternoon. He appeared at approximately 2 o'clock in the afternoon at my apartment at 225 Chestnut Street. This particular apartment has a living room, bedroom, bathroom and a hallway and a kitchen. The so-called listening post was adjacent to the hallway. (TR 44.) A listening post consists of master controls that are directly connected to microphones located in each room in this particular apartment, so a person at the listening post could hear conversations in other parts of the apartment. I had a conversation with Mr. Yep at that time. I told him that I would like to order another two ounces of stuff. He said he will go contact his friend and get it, so he left. I saw him again about 4 o'clock in the afternoon at the apartment at 225 Chestnut Street. (TR 45.) We discussed about the price of the narcotics. He claimed my offer was a little low; that he couldn't get it for any less than \$600 per ounce. (TR 46.) He told me that my offer, original offer, was too low; that he couldn't get anything for less than \$600 an ounce and that he couldn't find the original connection. However, he found a secondary connection who can furnish me this stuff for \$600 an ounce. I told him that was way out of line, I feel that it was a little expensive, to go back and talk to the man and see if he can bring the price down. So he left, and approximately 4:30 he called me. That was Yep. Approximately 4:30 he

telephoned me again and told me that he couldn't do anything, that the price would have to stand. I told him that, "since I have to leave town, I do want the stuff, go ahead and get it." And so he said, "O.K.". Approximately 5 o'clock he came back and told me he has already passed the order on; however, he won't be able to make delivery until later on that evening. So we set a meeting to meet later on that night at Compton's Restaurant about 8 o'clock, and he departed. About 8:15 I was at Compton's Restaurant located on Van Ness and Geary. The defendant Yep came in and told me that he was still negotiating trying to get delivery to me; that he was sure he could make it later that evening, for me to wait for his call at my apartment. (TR 48.) I heard from him approximately 9:30. He made a telephone call to me and he assured me that he was going to make delivery within the hour and that he was waiting for a man to come back with the stuff now and be sure and wait for him. He said he had saw (*sic*) the man, that he has placed the order and he is expecting the stuff to return to he could bring it up. (This is the language of the witness as it appears in the transcript. I did not see Mr. Yep again until approximately 10:15 that night. I saw him at my apartment. (TR 48.) This was February 1. He returned to the apartment and delivered to me one ounce of narcotic, Government's Exhibit 2 for identification. There is a rubber container in there that I initialed. This white powder is heroin. I paid \$600 in official advanced money for this particular quantity of heroin. He said he has to

return to the man, and left my apartment. I didn't describe that man or say what man. I had occasion to see Mr. Yep again on February 7, 1956, at my apartment, 225 Chestnut Street, at approximately 11:30 in the morning. We discussed about future deliveries and general topics of narcotics, and among one of the things he told me was his friend was going to buy a 1955 Cadillac with a canary yellow bottom and a black top. (TR 50.) He claims that he advised this friend against purchasing such a car because it was too flashy; that his friend was dealing and didn't have any other job and it would just call attention upon himself. In the trade "dealing" means a man who is selling narcotics. Mr. Yep said the man who was purchasing the car was dealing. He did not say whether this was his connection or not. He merely mentioned him as his friend. (TR 51.) On February 7 he called me and told me he couldn't see me until later that evening, and that would be about 7 o'clock. He came up and told me that he has contacted his connection and placed my order. However, he has to wait until he heard from the man; that he left the man at a Mah Jong game. To kill some time Mr. Yep and I went out to dinner at the Gino Restaurant on Columbia. (TR 51.) Then the defendant Yep dropped me off at the apartment and stated that he was going to join his connection and see if he can get my order filled. Approximately 8:30 he called and said he hadn't made any positive connection yet but he would contact me later. He did not contact me later on that night to my recollection. (TR 52.) About noontime on

the 8th Yep telephoned me at my apartment, and told me he was with his connection right then and that they are trying to get the stuff to make delivery to me; that he will call me later on in the afternoon. He called me that evening and said they haven't made any headway yet; that he will call me again next day. On the 13th early in the morning the defendant Yep came to my apartment and we discussed about this long delay he has been keeping me waiting for three or four days now and I questioned him as to his reliability of his connection, got his narcotics first, why couldn't he get me any more; he told me that he could get it for me at any time I wanted. He said he trusts his connection he is working with, the man is reliable, not only a good connection but a good friend of his; he used to be an ex-bookie, he is well off, he is loaded, is the word he used, and that he used to work in a cannery and no one knows the man is dealing, and he is a perfectly good connection to have. I said, "Be so good as to call him and get him on the phone and get my narcotics." He says he can't call the man because he didn't have a telephone; he would have to see the man. (TR 53-54.)

Thereupon the following proceedings occurred:

"Mr. Riordan. Again I am going to object vigorously and renew my objection on behalf of Ong as to the introduction of hearsay statements which are made obviously—and when you start referring to some other man I think it is quite evident that they are attempting to refer to the co-defendant here which must be Ong. There has been absolutely no proof of any conspiracy, so

therefore any acts or declarations on the part of Mr. Yep which come to this Court through Mr. Wu are highly objectionable at this point as being introduced.

Mr. Constine. May it please Your Honor, this objection is running to all the testimony, as I understand it, until we put the other agents on the stand.

The Court. Unless it is connected up, it will go out. Your objection at this time will be overruled." (TR 54.)

The Witness (continuing). I received a phone call from Yep later that evening. He told me that he didn't expect that he could deliver that night and I told him that I was leaving town, that "I wish you would give me a positive statement whether you could or could not get the stuff." I heard over the telephone he called someone by the name of Johnny, and then they spoke something which I did not hear. And then he came back on the phone and told me, he said definitely he couldn't get anything that evening. That was the extent of the telephone conversation. On February 17 about mid-morning the defendant Yep and myself was at the Mordern Cafe located in Chinatown. We discussed the delivery of narcotics and the defendant Yep told me that he has a shipment lined up for me; however, the man required payment in advance. I told him that I didn't do business that way; that I liked to see the merchandise before I buy it, and that under no circumstances I was going to pay for something I have not seen. He told me that his other connection was willing to put up a 1955 Cadillac

as collateral, was willing to sign the pink slip over as collateral for the shipment, and he can get me that particular shipment. I told him I didn't care how he made the arrangements as long as I could get the narcotics and look at it, and if I like it I will pay him cash on the line. So he said he was going back and see if he can set it up. (TR 56.) On the 19th the defendant Yep came up to my apartment at 225 Chestnut Street, and again I questioned the defendant Yep as to the reliability of his connection again. He told me that he is expecting shipment in on a ship; that if that failed to arrive he still has this other deal where he had this friend putting up the Cadillac as collateral; that we can always count on that in case we missed the boat shipment.

Thereupon, counsel for the Government offered evidence of a transaction between the witness and Yep on February 21, stating that the evidence was offered against Yep only. (TR 58.)

The Witness (continuing). I did not see the defendant Johnny Ong at any time prior to his arrest. (TR 61.)

BRUCE E. HIPKINS, called and sworn on behalf of the Government, testified: I am a Federal Narcotic Agent assigned to the San Francisco Field Office. I saw the defendant Yep on February 1, 1956, at approximately 2:00 p.m. He drove up to 225 Chestnut Street. I did not see him enter the apartment. I saw him drive up to it. I did not see him get out of his car. I observed Rocky driving from the address approximately 15 or 20 minutes after I first saw him.

(TR 79.) He drove directly to 83 Winfield Street. (TR 80.) That is the address of the defendant Johnny Ong. I saw him enter a doorway there. I saw him leave there and drive to Mason Street between the intersection of Jackson. I saw the defendant Johnny Ong at approximately 3:55 p.m. on that day driving a '51 Caddillac with a dark top and light bottom. I know the license number CKC 040. At that time the defendant Yep got into the car. He was parked there and he got into the car with the defendant Ong. (TR 81.)

Thereupon the following proceedings occurred:

“Mr. Riordan. If it please the Court, again as to all the testimony that has been had in the past in relation to this witness, I hereby object to the same as being incompetent, irrelevant and immaterial and as to the defendant Ong being hearsay.

Mr. Constine. This time, Your Honor, he is testifying to what he saw the defendant Ong do. That is not hearsay.

Mr. Riordan. That goes to competency and relevancy; hearsay insofar as seeing Yep make these various trips. I object to that on the ground of the fact that there is no foundation laid as to any conspiracy being involved and presented at this particular time.

The Court. The objection will be overruled.” (TR 81.)

The Witness (continuing). I observed the defendant Yep here. He had parked in his 1952 Mercury, License No. CKB 445, on Mason near the intersection of Jackson. At approximately 3:55 I saw the defendant Johnny Ong drive up in his Cadillac. At

that time the defendant Yep got into the car with Ong and they drove around for approximately five minutes. (TR 82.) I next saw the defendant Yep get out of the car and get into his. I followed the defendant Ong to Chinatown where he parked his car on Washington near Waverly. I saw the defendant Yep again on that day leaving the apartment at 225 Chestnut Street approximately 4:30 p.m. I followed him. He went to the intersection of Francisco and Powell. He got out of the car and was lost to my view; he was covered by other agents. I saw him again approximately 5 o'clock when he drove to 225 Chestnut Street. That was Mr. Wu's address. I saw the defendant Yep riding in the defendant Ong's Cadillac at the vicinity of John and Mason Street, approximately 7:30 in the evening. (TR 83.) I saw the defendant Ong driving his Cadillac. He drove around and then returned the defendant Rocky to the vicinity of John and Mason. The car stopped and the defendant Rocky got out. I saw the defendant Yep at approximately 8:30 p.m. leaving Compton's Restaurant, at which time he drove to the intersection of Jackson and Mason. He got out of his car and walked across the street and was lost to my view. I did not see him again for approximately five minutes when he returned to his car. I did not see the defendant Ong at that time. (TR 84.) I saw a Cadillac of this same color and year drive away from there, but I couldn't say it was definitely him or his car. (TR 84.) There were other agents present. After I saw this Cadillac drive away, Yep got into his car and stayed there for a

while and back onto the street corner in just a period of an hour or a little better where he was in the car or on the street, just walking back and forth between the two. And at one time he walked across Jackson out of view and then stayed for three or four minutes and then came back to the car. I saw the defendant Ong at approximately 10 o'clock p.m. driving his Cadillac close to the intersection of Jackson and Mason, where Yep was waiting. (TR 85.) The defendant Ong parked the automobile on Jackson right on the corner of Mason and walked across the street with a child in his arms. And as he got across the street he was joined by the defendant Rocky and the two of them walked into the doorway at 1003 Jackson. They stayed in there for approximately a minute. The defendant Rocky came out of the doorway, got into his Mercury and drove directly to 225 Chestnut Street. (TR 85.) In the space of ten minutes or so I next saw the defendant Yep driving from 225 Chestnut Street back to the same corner, Jackson and Mason, and we were slightly a little bit behind. By the time we got up close we saw the defendant Rocky and Ong there get into the Mercury and drive around for several blocks in the space of just a few minutes. (TR 86.) Then the defendant Ong was returned to the corner of Jackson and Mason, at which point the surveillance discontinued. On February 7, 1956, I saw the defendant Yep go to 225 Chestnut Street at approximately 11:20 a.m. He stayed there until approximately 12 o'clock. At that time I followed him from 225 Chestnut Street to Bay Meadows Racetrack. He

stayed there from approximately 1 o'clock till about 5:20. The defendant Ong joined defendant Rocky at the racetrack. (TR 86.) I saw the defendant Yep leave there about 5:20 p.m. Mr. Ong was not with him at that time. Yep went from there to 83 Winfield and stayed there a few minutes. Then he went to Chinatown area and went to this Mah Jong place at 31 Spofford Alley. I saw him park his car in that vicinity and he was out of sight. I saw him coming out of that place and I followed him to 225 Chestnut Street and observed him go to the address. Then he left in the company of Agent Wu and went to a restaurant over on Green Street. (TR 87.) Then he returned with Agent Wu to 225 Chestnut Street, and from there he went back to the Mah Jong place at 31 Spofford Alley. I didn't see him enter. I saw him come from it at approximately 9:15 p.m. in the company of Johnny Ong. They walked to Clay Street and stood by a 1955 Cadillac, black top, yellow bottom, License No. 1L-23456. (TR 88.) My surveillance ended after the two of them walked down to the defendant Yep's Mercury. (TR 88.) On February 22, 1956, I had occasion to arrest the defendant Johnny Ong in the presence of Agent Wolski. We arrested him in front of his home at approximately 4:30 a.m. on the 22nd of February. He had just drove up (*sic*) in his 1955 Cadillac. After the arrest while we were searching the place for narcotic contraband, we interrogated Johnny Ong. We had no search warrant. (TR 89.) I am not sure whether a complaint had been filed before the Commissioner. I don't know whether we had a warrant

for his arrest. We told him he was under arrest. We identified ourselves and said he was under arrest and had been implicated in the narcotic transactions with the defendant Rocky Yep. This was on the same night, extending into the next day. Rocky was arrested on the 21st late and this was 12:30 a.m. on the 22nd. I don't know whether he was brought before the Commissioner on the 23rd when the Commission was in session. After the arrest we booked him at the County Jail. (TR 90.)

Thereupon the following proceedings were had:

“Mr. Constine. Q. Will you kindly repeat the conversation? Tell us what was said.

A. At that time I accused the defendant Ong of delivering a quantity of narcotics to Rocky on February 1st and it was my opinion that the night—

Q. Wait; is this what you were telling him?

A. Yes; it was my opinion that he had concealed the narcotics in the diaper of the child due to the fact that yellow stains were found on the container.

Q. This was what you had advised Mr. Ong?

A. Yes, and at this time—

Q. Go ahead.

A. At this time his wife came in and said that ‘I told you you would get into trouble’—

Mr. Riordan. I am going to object again, Your Honor. May my objection go to all of this testimony as being incompetent, irrelevant and immaterial again and bringing in hearsay, and the conspiracy and the overt acts in relation to any conspiracy have not been established.

The Court. The objection will be overruled. He is entitled to what occurred at that time and place, what was said, if anything.

Mr. Constine. Q. You accused him of engaging in this narcotic transaction; is that correct?

A. Yes.

Q. And the wife said to the defendant Ong in Ong's presence, "I told you you would get in trouble"?

A. 'I told you you would get into trouble running around with Rocky.'

Q. And what if anything did Mr. Ong say in reply to your accusation?

A. He said nothing at that time.

Q. Did he make any statement at all?

A. Nothing. He said nothing." (TR. 91-92.)

The Witness (continuing). I asked him what his occupation was and he stated that he had been unemployed for the past year. I asked him how he could explain buying the house, paying cash for the Cadillac and everything, and not working. He stated his income was derived from gambling. I searched the house. I did not find any phone in the premises. (TR 92.)

On cross-examination the witness testified. I did not have a warrant to search that house. I found no contraband. (TR 93.)

ELDON R. PRZIBOROWSKI, called by the Government, testified:

I am a narcotic agent employed with the United States Bureau of Narcotics and assigned to the San

Francisco Office. I saw the defendant Ong on February 1, at about five minutes to 4:00 in the afternoon driving a Cadillac automobile, License No. CKC 040 and park on Mason Street alongside of where the defendant Yep was seated in his automobile. The defendant Yep got out of his automobile and entered the Cadillac driven by the defendant Johnny Ong. They drove around a few blocks and the defendant Yep got out of the automobile, and I followed the defendant Johnny Ong to where he parked the Cadillac automobile on Washington Street between Grant and Waverly Place. On the evening of February 1, I saw the defendant Ong driving the same Cadillac automobile west on Jackson Street and turn north out of Powell Street, turn around the corner, and then entering this alley or street called John Street and park about a fourth of the way up the street right alongside of where the defendant Yep was already seated in his Mercury automobile. That was between 7 and 7:30 p.m. (TR 103.) After Mr. Yep entered Mr. Ong's automobile, they drove around the block and the defendant Yep got out of the Cadillac automobile driven by the defendant Johnny Ong and entered his own automobile and drove off. I next saw the defendant Yep drive away from the vicinity of Compton's Restaurant on Van Ness Street. I followed the defendant Yep to the vicinity of Jackson and Mason Street where he parked his automobile on the south side of Jackson Street. The defendant Yep got out of his automobile and walked west on Jackson Street where some other Chinese people appeared on the

street, and he stayed in that vicinity for a short period of time. Then he walked across the street, across Mason Street with a Chinese I couldn't recognize. It was a Chinese similar to the defendant Ong, but I couldn't say it was Ong at that time. Then I went back to the automobile I was seated in with Agent Hipkins. Then I next noticed the defendant Johnny Ong's automobile driving away—the Cadillac. At approximately 10 p.m. I saw the Cadillac return to the area, and the defendant Ong got out carrying a small child in his arms, and he walked over to the entrance way of 1003-5-7-9 Jackson Street, and as he approached there the defendant Yep jumped out of his automobile and walked into the common entranceway side by side. In just a very short period of time, the defendant Yep came from this common entranceway and entered his automobile and drove off, and I followed him back to the apartment house at 225 Chestnut Street, where Mr. Wu was. At approximately 10:20 p.m. I saw Mr. Yep leave 225 Chestnut Street. I followed with Agent Hipkins in our automobile and we followed the defendant Yep's automobile rather loosely, and by the time we parked on Jackson Street between Mason and Powell the defendant Yep had already gotten out of his automobile and I saw the defendant Yep with the defendant Ong return and get into the defendant Yep's automobile—into the Mercury. They went west on Jackson Street and rode around either one or two blocks and then the Mercury automobile returned to the vicinity of Jackson and Mason Street. One of the occupants got out and the Mercury automobile drove off. (TR 106.)

JOHN A. STENHOUSE, called on behalf of the Government, testified: I am a Treasury Agent of the United States Bureau of Narcotics and have been so engaged for the past two years. I am assigned to the San Francisco Field Office of the Bureau of Narcotics. On February 1, 1956, I observed the defendant Yep approaching 225 Chestnut Street in a 1952 Mercury vehicle. I was seated in a 1952 Chevrolet coupe. There was a radio in the car. (TR 108.) It was equipped with a two-way radio; I could send and receive messages with other units of the same equipment. There was a unit in Mr. Wu's apartment. At approximately 2 p.m. I heard Mr. Wu's voice over the loudspeaking system in our car. I recognized it as Mr. Wu's voice. I heard him addressing a person named Rocky. There was an instantaneous reproduction of the voice.

Thereupon the following proceedings were had:

"Mr. Riordan. If it please the Court, again on behalf of my client I will now object to any and all testimony that has been received already and will be received along this line on the basis of the fact that it is incompetent, irrelevant and immaterial as to the defendant Ong, that it is hearsay and is being improperly allowed in against Mr. Ong in view of the fact that no conspiracy has been developed.

Mr. Ringole. I make the same objection. (TR 109.)

Mr. Constine. Those objections have been made, Your Honor, and I understand they are under submission; and we are connecting it up now, we are proving the conspiracy by their acts and actions. That is what we are trying to do.

The Court. I will allow that in subject to your motion to strike and over your objection.

Mr. Riordan. I am renewing this objection with every witness. If the Court states I do not have to, that it would be considered as running to all the Government evidence—

Mr. Constine. We have already said we understanding (sic) that he is objecting to all the testimony.” (TR 110.)

The Witness (continuing): I recall this person addressed as Rocky to state to Agent Wu that he had three connections already lined up on ships and that he could supply at a later time any quantity of stuff that Agent Wu might wish to have. He further stated that he had another connection within the city that was a respectable family man. That is just about all the conversation I can recall. On that occasion it was all in English. The subject they were speaking about was Agent Wu being in the market for narcotics, and after a short stay the person identified as Rocky stated that he was going to pick up now. (TR 111.) Yep left 225 Chestnut Street in the previously described Mercury vehicle and drove directly to 83 Winfield Street. Later that day I saw the defendant Ong near the intersection of Mason and Jackson Streets, at approximately 3:55 p.m. I observed the defendant Yep to be parked at approximately 1254 Mason Street in his Mercury vehicle. At 3:55 p.m. I observed this 1951 Cadillac with California License CKC 040 to drive alongside, being driven by a person I later identified as Johnny Ong, and defendant Yep entered that vehicle. (TR 112.) They drove around the block about

four turns. Then the defendant Yep left the Cadillac and entered his Mercury automobile and drove back to 225 Chestnut Street. I could not see him enter. I could not see him actually leave the doorway. I saw him again on February 1 as he left 225 Chestnut Street for the second time and drove to the area of Francisco Street and Powell Street. He left his vehicle and attempted to enter the Mambo City tavern. He could not get in there, and then went to a grocery store located across the street from there. He disappeared from my view therein for a very few minutes. (TR 113.) He then entered his vehicle and again returned to 225 Chestnut Street. At approximately 7:10 on the evening of February 1, I saw the defendant Yep leave his residence, 735 Washington Street, and drive to the vicinity of 32 John Street. He parked his vehicle there, and I had a conversation with other agents in another car. I saw the defendant Ong's automobile. I couldn't identify the driver at that time. I saw the license of the automobile, and that was the same automobile I saw the defendant Ong in previously. I observed this Cadillac going west out of John onto Mason Street. (TR 114.) I next saw the defendant Yep within Compton's Restaurant at Geary Street and Van Ness Avenue at about 8:10 p.m. He was with Agent Wu, I observed them to have a conversation for about 15 minutes, and then defendant Yep left Agent Wu. Thereafter I saw him within a very short time in the vicinity of Jackson and Mason Streets. I was on foot surveillance and observed defendant Yep to approach an unidentified female accompanied by a Chinese person that I identify as

Johnny Ong in front of the common doorway at 1003 Jackson Street. I observed the defendant Ong drive his 1951 Cadillac from that area and he disappeared from my view. The defendant Yep stayed within the area until about 10:10 p.m. I observed defendant Ong return in the 1951 Cadillac and park it on the northwest corner of Jackson and Mason Streets. He crossed the street and entered the common doorway residence with the defendant Yep, who approached him simultaneously. (TR 115.) I observed the defendant Yep come out in approximately I would say a minute; he entered his Mercury vehicle and drove directly to 225 Chestnut Street. I followed him and discontinued surveillance of defendant Yep at that time. (TR 116.) On February 6, 1956, I saw both defendant Yep and defendant Ong together with another unidentified Chinese person that is employed at the Union Oil Station at Geary and Polk Streets. The three walked to the used car Cadillac Sales Company located at Polk and O'Farrell Streets. The three met with an unidentified salesman and were looking at, for over an hour, a 1955 Cadillac with license 1-L 23456. It is ivory with a dark top. That was the completion of my surveillance on that day. I next observed defendant Yep on February 7 at about 11:15 a.m. approaching 225 Chestnut Street.

Thereupon the following proceedings were had:

“Mr. Riordan. May I interrupt for a moment, Your Honor? It is my understanding I must be a little more specific; that my objection as to the competency, relevancy and materiality also goes

to the testimony of this witness in relation to his observance of my client and two other Chinese individuals going to the Cadillac automobile.

Mr. Constine. So far as the relevancy is concerned, Your Honor, the relevancy of his testimony is to identify the individual from whom Yep was obtaining his narcotics. He had described him to Mr. Wu as purchasing a new '55 Cadillac, or just about to, and this agent is testifying that he saw Mr. Yep and Mr. Ong on the day before at the Cadillac lot. And in subsequent testimony we intend to prove that he saw Mr. Ong actually driving this particular 1955 Cadillac. Its relevancy is for the purpose of identifying the individual Mr. Yep was talking about.

The Court. For that limited purpose I will allow it.

Mr. Riordan. Again, Your Honor, he is going right back to the problem of hearsay which always arises in this type of testimony.

Mr. Constine. Q. You saw Mr. Ong on February the 6th?

A. Yes, sir.

Q. What happened on February the 7th, the next day?

A. At about 11:15 a.m. I observed the defendant Yep to again approach the residence at 225 Chestnut Street.

Q. Go on. What happened?

A. I heard a conversation over the radio.

Q. Where were you?

A. I was still within the government vehicle in which I was driving.

Q. Did you hear Mr. Wu's voice?

A. Yes, sir.

Q. Did you hear the voice of the man you had heard previously?

A. Yes, sir.

Q. Did you hear him addressed by name?

A. Yes, sir.

Q. What name?

A. He again referred to the other individual as Rocky.

Q. All right. Now would you kindly, to the best of your recollection, repeat the conversation?

Mr. Constine. And I understand counsel has the same objection.

Mr. Riordan. Yes.

Mr. Ringole. And I will make the objection that it is incompetent, irrelevant and immaterial.

The Court. Let the record so show.

Mr. Riordan. May I get the date?

Mr. Constine. February 7th—at what time? 11:15 a.m.

Mr. Ringole. The indictment indicates that this conspiracy was consummated on February 1st.

Mr. Constine. It does no such thing, Your Honor. Mr. Ringole is stating something that is not so. The indictment states that a time and place unknown to the Grand Jury these defendants conspired. One of the overt acts set forth happens to be February 1st.

Mr. Ringole. Will you read the indictment? You will see that the sale was on the 1st of February and you will see that the overt acts were all on the 1st of February and those that you prove directly were on the 1st of February with reference to the subject matter of this conspiracy.

Mr. Constine. I might state for the record, Your Honor, so that the record is clear, that in paragraph 1 of the conspiracy count of this indictment it states 'that at a time and place to the Grand Jury unknown, the defendant Yep and Ong, alias Johnny Ong, and others to the Grand Jury unknown did knowingly and willfully conspire together.'

I think that is sufficient for the purposes of this objection.

The Court. The objection will be overruled. Will you proceed." (TR 117-120.)

The Witness (continuing): This particular conversation was at times in Chinese and at times in English. I do not understand Chinese. I overheard the person's voice of Rocky stating that his connection was considering purchasing a new Cadillac. I further heard Rocky to state that he would like to go back to the Orient, and he spoke of the living conditions over there, the rate of exchange. And that's about all I can recall. The defendant Yep left this place and proceeded directly to the San Mateo racetrack. I saw Mr. Ong in the F section of the uppermost stands, and he was in company with defendant Yep. I saw defendant Yep leave. I did not see Mr. Ong leave. (TR 121.) I followed Mr. Yep. He returned immediately to 83 Winfield Street and stayed there a very short time and continued on back into the Chinatown area. I ended my surveillance at that time. I am not sure that I saw Mr. Ong the night of February 7. On February 8, I observed defendant Yep leave his

residence and go directly to 83 Winfield Street where he met defendant Ong. The two entered the 1955 Cadillac and disappeared from my view. I didn't see them until about 3:15 in the afternoon. (TR 122.) The two were seated in the Cadillac at the Union Oil Service Station at Polk and Geary Streets. On the 22nd of February, 1956, I saw Rocky Yep at the headquarters office. I asked him if he was aware of all the sales he had made to federal undercover agents. He stated that he was. He was very cooperative. I asked him about some of his associates. He says, "You have me right". He says, "Can I take the rap alone without involving anyone else?" I said, "Well, how about Johnny Ong?" He says, "Oh, he is a good family man." He says, "You got me; that's it." That is about all the conversation I can recall at this time. (TR 124.)

DANIEL P. ALBEE, called and sworn as a Government witness, testified: I am a salesman at the Cadillac Motor Car Division on Van Ness Avenue in this city. I had occasion to see the defendant Johnny Ong on February 6th of this year. He purchased a Cadillac automobile from my division. (TR 126.) A man by the name of William Chan, who works at the Union Oil Station at the corner of Polk and Geary was with him. The car was a 1955 Cadillac. It was a two-tone. He came back the next day and completed the transaction. The car was purchased by Johnny Ong in the name of Jennie Leong or Jeong. I understood she was Mr. Ong's wife. His name was not on the car. (TR 128.)

On cross-examination the witness testified that a Cadillac 1951 coupe was turned in as part of the purchase price on the car, and that the defendant gave the witness \$1400 in cash and an additional \$200 which the defendant borrowed from Chan. (TR 129-137.)

CHESTER J. WOLSKI, called and sworn on behalf of the Government, testified: I am a Treasury agent with the United States Bureau of Narcotics and have been so engaged the last two years. On February 1st, 1956 I was on duty that day with other agents surveiling Mr. Yep and Mr. Ong. I did not see either of the defendants on that day. (TR 141.) I was with Agent Stenhouse in a Government vehicle and we observed the defendant Ong driving a Cadillac coming from John Alley into Mason and drive away. I did not see Yep at that time. Then later on we picked up the defendant Yep and we followed him around Chinatown to the area of Pacific and Grant where he parked the car for a time and then we waited for his return and followed him — momentarily lost him and followed him, or rather saw him at Compton's Restaurant at the corner of Geary and Van Ness. Agent Stenhouse went in the restaurant while I parked the vehicle so we would be ready to follow the defendant Yep if he left. They were in there approximately ten or fifteen minutes. I observed the defendant Yep come out to the street and in a few seconds followed by Agent Wu. Then we continued following Yep down to the Chinatown area. Again momentarily we had lost view of him but we did see

him parking the car in the vicinity of Mason and Jackson. (TR 142.) I saw him meet an unidentified Chinese male who was later identified as Johnny Ong. They had a conversation and Johnny Ong drove off in a 1951 Cadillac, license CKC-040. During that time Yep was in and out of the car, walking around the streets. Approximately at 9:30 I had occasion to go over to the drugstore to purchase a pack of cigarettes. As I left the drugstore I observed that the defendant Yep was walking across directly from me on Mason Street, and he entered the drugstore, so I stopped and put the doorway under surveillance on the opposite side of the street. He was in there approximately five minutes. Approximately 10 o'clock I again observed this Cadillac, the same license, and the defendant Johnny Ong, parked on the north side of Jackson facing west, and I saw Johnny Ong get out of the car with a child in his arms and he crossed directly across the street where he was joined by defendant Yep, and they both entered the common doorway of 1003 Jackson Street. In approximately a minute's time I again observed the defendant Yep return to his car, a 1952 Mercury, and drive directly to 225 Chestnut Street. We had a little vehicle trouble so we had to discontinue surveillance. Two days later, on February 7, 1956 I had occasion to see the defendant Yep at 225 Chestnut. I was stationed at the listening post again. I heard a conversation between Agent Wu and the defendant Yep. Yep stated that he advised his friend not to buy the Cadillac because it would draw a lot of attention and explanation.

(TR 145.) On February 22 at approximately 4:30 A.M. we observed Johnny Ong parking his Cadillac in front of his garage driveway at 83 Winfield Street. So we immediately went over there and I identified myself and I told him he was implicated in narcotics. I put him under arrest by saying he was implicated in a narcotic transaction. So I asked him if it would be all right to search the premises. So later on we did that and throughout the search we had an interrogation going on. So I confronted him that he had been observed by numerous agents in the company with defendant Yep. I specifically referred to the night of February 1st, that he was seen with this child driving up in a Cadillac and he and the defendant Yep going in the doorway, to which he remained silent and gave me no answer. In the meantime his wife retorted, "I told you you would get yourself into trouble by fooling around with Rocky." To this again he gave no answer. He remained silent. So I asked him, "What is your source of income for all this?" And I asked him what he had for a job. He said, well, I am unemployed, so I asked him what the source of income was and he told me he was a gambler. He did not have a telephone. (TR 148.)

On cross-examination the witness testified: I did not have a warrant for the defendant's arrest. I had no search warrant for his home. (TR 150.)

Thereupon Government's Exhibits 1 and 2 for identification were introduced against each of the defendants in the case. (TR 153.)

On the following day, April 26, 1956, upon the convening of Court, counsel for the defendant Ong made the following motion (TR 154):

“Mr. Riordan. If it please the Court, at this time I would move to strike or exclude the evidence upon the grounds that the Court overruled my objection as to the incompetency, irrelevancy, and immateriality of the evidence that was produced on this stand as to Johnny Ong, and also as to all hearsay statements that were allowed during the course of this hearing, on the grounds that the same were made outside the presence of defendant Ong; that they were matters that were hearsay, that were allowed into evidence without the establishment of the corpus delicti of the conspiracy, being the agreement, and the fact that whatever hearsay statements are allowed in during the course of this trial were not or could not in any way be construed as matters in furtherance of a conspiracy.

“Now, I will eliminate some of the, perhaps, technical objections that I have. Very briefly now, I am going to object to any statements that were made by the agents, any acts or failure to act in relation to statements made by the agents on the part of Johnny Ong at the time of his arrest, and any statements made by his wife. Obviously, those are complete hearsay, Your Honor. In no way could they be construed as an admission against Mr. Ong or in any way in furtherance of a conspiracy.

“Now, I am going to pass over some technical objections. I will object to those statements at the time of the arrest and after the arrest, on the grounds that the arrest was made after long

surveillance, and obviously, as this sale was at 10:15 the previous evening, there was time, in my opinion, to get a warrant for arrest.

“Another objection I have on that ground is that there was lack of reasonable cause to believe that a felony was being committed or had been committed by Johnny Ong.

“Another objection that I will have, Your Honor, is that a search of the house was made to ascertain, you will recall, as to whether or not there was a telephone in the home of Mr. Ong. I object to any search of Mr. Ong’s home, on the ground that no warrent for the search was obtained, they having had plenty of time to obtain the same.

“I also object, Your Honor, to any statements made by Rocky Yep outside the presence of Johnny Ong after Mr. Ong — rather, after Mr. Yep — had been picked up and was in custody; that obviously, even assuming that there had been a conspiracy, it was after the last overt act, and it was at the time of the apprehension and could not, in any way, be construed as a furtherance of a conspiracy.” (TR 156.)

The Court denied the said motion. (TR 165.)

Counsel for the defendant Ong also moved for a judgment of acquittal as follows:

“Mr. Riordan. I at this time, Your Honor, move for a judgment of acquittal on behalf of defendant Johnny Ong. It is my understanding of the law, Your Honor, on this particular motion, that it is the sole duty of the trial judge to determine whether substantial evidence, taken in a light most favorable to the Government, tends

to show the defendant guilty beyond a reasonable doubt. Now, it is my contention, Your Honor, that there is absolutely no substantial evidence in this case which would tend to prove this defendant, Johnny Ong, guilty beyond a reasonable doubt.

“Firstly, let me state, Your Honor, just in opening, that I believe the defense of entrapment is properly before this Court. My recollection—again I may be wrong on it, but I will put it forward to the Court—is that on the first day of February, 1956, Mr. Wu telephoned Mr. Yep and asked him to come to his apartment. I submit to the Court that the facts as shown before this Court are evidence of entrapment on the part of the Government, through Mr. Wu, to have Mr. Yep engage in the sale of narcotics on that particular day. If that be true, then it in turn inures to the benefit of defendant Ong.

“Again, Your Honor, I submit—or I state at this time—that there is no substantial evidence before the Court from which this Court can state that, beyond a reasonable doubt, a conspiracy has been proven on the part of Mr. Ong and Mr. Yep. There is no evidence of knowledge by Johnny Ong as to any acts or intentions on the part of Mr. Yep. There was no evidence of any intent on the part of Johnny Ong to deal in narcotics in any fashion. There was no evidence of a mutuality of intention and act on the part of Johnny Ong and Mr. Yep to deal in narcotics.” (TR 154-165.)

The Court denied the said motion. (TR 165.)

ONG WAY JONG, also known as JOHNNY ONG, called and sworn on his own behalf, testified: I am

twenty years of age. I never sold or dispensed or disposed of any narcotics to Rocky Yep. I never agreed with Mr. Yep to sell or dispense or dispose or agree to conceal or transport any narcotic drugs. (TR 176.) I have known Rocky Yep about ten years. I have gone around with him for some time and have been friendly with him. I never discussed the fact that I would give him my automobile or any automobile that I owned as security to have anything to do with narcotics dealings. I do not remember making any reply to the accusation of the agents when they arrested me that I was part of a narcotics ring. (Tr. 178.) The only thing I recall, on February 1, is that the little boy was with me because that night I took him to the barber shop. That was his first haircut. I have two children. (TR 179.) I do not recall being at the Bay Meadows racetrack the day I purchased this automobile. Rocky Yep used to come to my home three or four times a week. I do not recall Rocky Yep getting into my automobile around 3 or 3:30 or 3:50 in the afternoon of February 1. When I went to the barber shop the barber was not in so I drove up to Lucy's Place and Lucy was not in. I arrived back at the barber shop a little after 7. My regular barber was in and he was kind of busy and he told me to come back after closing time. I went up to Lucy's sister-in-law's apartment. It was in the same building on Jackson Street. On my second trip to Lucy's I saw Rocky Yep. I went in there and watched TV for about twenty minutes and the whole bunch of us left. Then I left about nine o'clock. Then I went back to the barber shop and the little boy got a haircut. (TR

181.) Then I returned to Jackson Street around 10 o'clock and saw Rocky Yep sitting in his car in front of Duck Fong's place. My little boy was still with me. Then I went up to Duck Fong's and played mah jong. I think Rocky stayed there for about five or ten minutes when he left. At none of these meetings that I have referred to was there any mention of any dealings in narcotics between Yep and me. Neither at that time nor prior to that time did I have any agreement with Mr. Yep that I would have anything to do with narcotics. (TR 185.)

On cross-examination the witness testified:

I have been committed (*sic*) of a felony in Los Angeles. I was charged with possession of heroin and pleaded guilty to it. I did not know that Yep was dealing in narcotics and never discussed it with him. (Tr. 190.)

WILLIAM CHAN, called and sworn on behalf of defendant Jong, testified: I was the owner of an automobile before February 7, 1956, a 1953 Cadillac coupe. I turned it over to the defendant Johnny Ong because I could not keep up the payments and insurance, and it was a good opportunity for me to get rid of the car. The Cadillac people took the car and they wholesaled it out to a wholesaler and then they paid off the bank for me and the balance of the car was put toward Johnny Ong's car. (TR 204.) I was with him when he handed over a certain amount of cash to the Cadillac people. I gave him \$200 because he didn't have enough on him to pay the balance of the car. (TR 204.)

HELEN ONG, called and sworn on behalf of defendant Jong testified: I am the sister of the defendant Johnny Ong. I recall his buying a 1955 Cadillac. I lent him \$300 for that purpose. (TR 206.)

EDWARD ONG, called as a witness on behalf of the defendant Jong testified: I am the brother of the defendant Johnny Ong. I recall my brother getting a 1955 Cadillac. I loaned him \$1200 to buy the car. (TR 211.)

Thereupon, after argument of counsel, the District Court made the following order:

“I find both of the defendants guilty as charged in the indictment on counts one, two and three.”
(TR 213.)

Thereafter, and on May 4, 1956, the defendant Ong, moved for a new trial upon the grounds:

1. That the Court erred in denying his motion for a judgment of acquittal;
2. That the verdict was contrary to the weight of the evidence;
3. That the verdict was not supported by the evidence;
4. That the Court erred in admitting the testimony of all Government witnesses to which objections were made.

Counsel for the defendant Ong also moved for a judgment of acquittal.

Thereupon, after argument of counsel, the Court denied the motion for a new trial and the motion for a judgment of acquittal. (TR 235.)

Thereupon the Court sentenced the defendant Ong to be imprisoned for a period of five years and to pay a fine of \$1.00. This sentence was imposed May 10, 1956 and on May 17, 1956, (TR 236) appellant filed his notice of appeal to this Court and designated the complete record and all the proceedings and evidence as the record on appeal. (TR 18, 22.)

SPECIFICATION OF THE ERRORS RELIED UPON.

1. The evidence was insufficient to justify the judgment of conviction;

(a) The *corpus delicti*, that is, the conspiracy itself, was not established;

(b) There was no competent evidence to establish the existence of any conspiracy between appellant and WEE ZEE YEP;

(c) The only evidence of any participation of appellant with any transaction in narcotics consisted of hearsay acts and declarations of the alleged co-conspirator, which were incompetent to establish the conspiracy, and which were not binding upon the appellant.

2. The District Court erred in denying the motions of appellant for a judgment of acquittal.

3. The District Court erred in denying appellant's motion for a new trial.

4. The trial Court erred in admitting, over the objection of appellant, the hearsay testimony of Milton K. Wu as to his dealings and conversations with

the alleged co-conspirator, Wee Zee Yep, all of which were out of the presence of the appellant whom the witness testified that he never saw at any time prior to his arrest. (TR 61.)

In this behalf we ask to be relieved of the provisions of Subdivisions (d) of Rule 18 of the Rules of the United States Court of Appeals for the Ninth Circuit; which provides:

“When the error alleged is as to the admission or rejection of evidence the specification shall quote the grounds urged at the trial for objection and the full substance of the evidence admitted or rejected.”

We make this request for the reason that full compliance with the provisions of the rule would necessitate the reprinting of all of the testimony of the witness following the objection made by appellant's counsel at page 38 of the transcript. The full substance of this evidence has been heretofore set forth in the abstract of the case, to which we hereby refer, submitting that the restatement of this evidence should be omitted in the interest of brevity.

5. The trial Court erred in admitting in evidence alleged accusatory statements made in the presence of the appellant as testified to by the witness Hipkins, as follows, to-wit:

On February 22, 1956, I had occasion to arrest the defendant Johnny Ong in the presence of Agent Wolski. We arrested him in front of his home at approximately 4:30 A.M. on the 22nd of February. He had just drove up (*sic*) in his

1955 Cadillac. After the arrest while we were searching the place for narcotic contraband, we interrogated Johnny Ong. We had no search warrant. (TR 89.) I am not sure whether a complaint had been filed before the Commissioner. I don't know whether we had a warrant for his arrest. We told him he was under arrest. We identified ourselves and said he was under arrest and had been implicated in the narcotic transactions with the defendant Rocky Yep. This was on the same night, extending into the next day. Rocky was arrested on the 21st late and this was 12:30 a.m. on the 22nd. I don't know whether he was brought before the Commissioner on the 23rd when the Commission was in session. After the arrest we booked him at the County Jail.

Thereupon the following proceedings were had:

“Mr. Constine. Q. Will you kindly repeat the conversation? Tell us what was said.

A. At that time I accused the defendant Ong of delivering a quantity of narcotics to Rocky on February 1st and it was my opinion that the night——

Q. Wait; is this what you were telling him?

A. Yes; it was my opinion that he had concealed the narcotics in the diaper of the child due to the fact that yellow stains were found on the container.

Q. This was what you had advised Mr. Ong?

A. Yes, and at this time——

Q. Go ahead.

A. At this time his wife came in and said that ‘I told you you would get into trouble!’——

Mr. Riordan. I am going to object again, Your Honor. May my objection go to all of this

testimony as being incompetent, irrelevant and immaterial again and bringing in hearsay, and the conspiracy and the overt acts in relation to any conspiracy have not been established.

The Court. The objection will be overruled. He is entitled to what occurred at that time and place, what was said, if anything.

Mr. Constine. Q. You accused him of engaging in this narcotic transaction; is that correct?

A. Yes.

Q. And the wife said to the defendant Ong in Ong's presence, 'I told you you would get in trouble'?

A. 'I told you you would get into trouble running around with Rocky.'

Q. And what if anything did Mr. Ong say in reply to your accusation?

A. He said nothing at that time.

Q. Did he make any statement at all?

A. Nothing. He said nothing." (TR 92.)

6. The trial Court erred in admitting in evidence the testimony of the witness Wolski:

"On February 22 at approximately 4:30 A.M. we observed Johnny Ong parking his Cadillac in front of his garage driveway at 83 Winfield Street. So we immediately went over there and I identified myself and I told him he was implicated in narcotics. I put him under arrest by saying he was implicated in a narcotic transaction. So I asked him if it would be all right to search the premises. So later on we did that and throughout the search we had an interrogation going on. So I confronted him that he had been

observed by numerous agents in the company with defendant Yep. I specifically referred to the night of February 1st, that he was seen with this child driving up in a Cadillac and he and the defendant Yep going in the doorway, to which he remained silent and gave me no answer. In the meantime his wife retorted, 'I told you you would get yourself into trouble by fooling around with Rocky.' To this again he gave no answer. He remained silent.'" (TR 146, 147.)

7. The Government officers were **agents provocateur** and the conviction cannot be sustained.

ARGUMENT.

SUMMARY OF THE ARGUMENT.

Aside from the hearsay declarations of Wee Zee Yep to Agent Wu, there is not even a scintilla of evidence to connect appellant with the sale of any narcotics or with the conspiracy charged in the third count of the indictment. Aside from the hearsay, there is no proof of the *corpus delicti*, which can never be established by hearsay evidence. The admission of the hearsay statements of the alleged co-conspirators was manifest and pernicious error. The admission in evidence of the accusatory statements of the agents made after the appellant's arrest, and undenied by him, was reversible error under a long line of decisions, including well considered opinions by this court. The evidence shows beyond all cavil that the genesis of the alleged offense of the sale of heroin charged as one of the overt acts in the con-

spiracy was in the mind of the agents who solicited and importuned the commission of the offense, thereby rendering the conviction void, under a long line of decisions, both State and Federal, including an array of cases decided on this Circuit.

I.

THE EVIDENCE WAS INSUFFICIENT TO JUSTIFY THE CONVICTION.

It should seem too clear to require citation of authorities or extended argument, that in a prosecution for conspiracy, as in all other criminal prosecutions, the defendant can only be convicted of the offense with which he is charged, and of that only by evidence which, whether it be direct or circumstantial, establishes his guilt beyond all reasonable doubt. Mere suspicion and conjecture are never sufficient to convict. Moreover, in a trial for conspiracy, as in all other prosecutions for crime, the *corpus delicti* must be established. Before one can be convicted of a crime it must first be shown that a crime was committed. The accused cannot be convicted even upon his own confession, unless the *corpus delicti* be established otherwise. In prosecutions for conspiracy, the conspiracy itself is the *corpus delicti*, and it must be proven by evidence which convinces the jury beyond a reasonable doubt.

We repeat that it should be unnecessary to cite the authorities in support of a rule of law so well settled

that it should be familiar to the veriest tyro at the bar; but in view of the proclivity of Government prosecutors in these days to demand convictions on the most far-fetched theories, it may be well to briefly call to the attention of the Court a few Federal and State decisions.

In *Wyatt v. United States*, 23 Fed. 2d 791, it was held that where any large conspiracy is specifically charged, proof of different and disconnected smaller ones will not sustain a conviction, and that proof of a crime committed by one defendant without relation to the other alleged conspirators is insufficient evidence to sustain a conviction for conspiracy.

In *Langer v. United States*, 76 Fed. 2d 817, it is held that proof of an unlawful agreement and of defendant's participation therein, with knowledge of the agreement, is essential in a prosecution for conspiracy, and that **mere evidence of participation in the offense which is the object of the conspiracy**, is insufficient.

In *Shannabarger v. United States*, 99 Fed. 2d 957, 961, the Court says:

“It is a settled rule of law that ‘in conspiracy cases, the unlawful combination, confederacy and agreement between two or more persons, that is, **the conspiracy itself**, is the gist of the action and is the *corpus delicti* of the charge.’ The agreement, must, therefore, be established before a conviction can be sustained. *Tingle v. U. S.* 8 Cir., 38 Fed. 2d 573, 575. The agreement, however, is a fact which, like most other disputed facts, may be proven by circumstantial evidence. Where the government relief upon circumstantial

evidence to establish the conspiracy, the circumstances must be such as to warrant the jury in finding that the conspirators had some unity of purpose, some common design and undertaking, some meeting of minds in an unlawful arrangement, and the doing of some overt act, to affect its object. See *Marx v. U. S. 8 Cir.*, 86 Fed. 2d 245, 250. Further the circumstances relied upon must be not only consistent with the guilt of defendants, but must be inconsistent with their innocence. *Spolitto v. U. S. 8 Cir.*, 39 Fed. 2d 782; *Salinger v. U. S. 8 Cir.*, 23 Fed. 2d 48; *Langer v. U. S. 8 Cir.*, 76 Fed. 2d 817.”

In *Young v. United States*, 48 Fed. 2d 26, a conviction of conspiracy was reversed because there was no evidence that the defendants “were acting in concert; for all that appears, each was acting only for himself.”

In *Cartello v. United States*, 93 Fed. 2d 412, the defendants were convicted of conspiring to injury citizens in the free exercise of their rights through the alteration of ballots in a general election. Reversing the conviction, the Court says:

“We again advert to the fact that aside from the evidence in support of an overt act, there is no evidence tending to show a conspiracy among these defendants. In the absence of such proof, proof sufficient to connect one of the defendants with the erasures and alterations on these ballots would, of course, be wholly insufficient to warrant a wholesale conviction of the other defendants. A conspiracy is the gist of the offense, and that conspiracy must be proven beyond a reasonable

doubt, either by direct or circumstantial evidence, or both. *Langer v. United States*, (C.C.A.8), 76 Fed. (2d) 817; *Dahly v. United States* (C.C.A.8), 50 Fed. 2d 37; *Tingle v. United States* (C.C.A. 8), 38 Fed. 2d 573, 575.

“As said in *Tingle v. U. S.*, supra:

‘In conspiracy cases, the unlawful combination, confederacy and agreement between two or more persons, that is, the conspiracy itself, is the gist of the action and is the *corpus delicti* of the charge. It is, therefore, primarily essential to establish the existence of a confederacy or agreement between two or more persons before a conviction for conspiracy to commit an offense against the United States can be sustained.’ ”

In *Tingle v. United States*, 38 Fed. 2d 573, cited in the foregoing decision, the Court concludes with language that should be decisive in the case at bar:

“It is apparent from the record before us, and was, in effect, assumed at the hearing, that appellant was guilty of a substantive violation of the National Prohibition Act. That, however, standing alone, furnishes no support of a conspiracy charge.”

True, there is evidence in the record that appellant and Yep were seen together upon a number of occasions, but that is certainly no evidence that they had entered into a conspiracy. Thus in *People v. Howard*, 58 Cal. App. 340, 208 Pac. 1022, it is said:

“It certainly would involve a proposition quite perilous to the liberty of many decent and law respecting citizens if it were true that the mere

circumstance that a person may be found in the company of a person known to have committed a larceny was to be regarded as evidence legally sufficient to establish his complicity in the commission of such crime. But that circumstance alone is not sufficient to establish guilt, and, as that is all that was shown against the three defendants we are now referring to, it is very clear that nothing approaching a legal case of guilt was made against them."

In *People v. Long*, 7 Cal. App. 27, 93 Pac. 387, it is said at page 33 of the state report:

"Conspiracy cannot be established by suspicions. There must be some evidence. **Mere association does not make a conspiracy.** There must be evidence of some participation or interest in the commission of the offense."

In *Dong Haw v. Superior Court*, 81 Cal. App. 2d 153, 183 Pac. 2d 724, it is said:

"Conspiracy cannot be established by suspicions. There must be some evidence. **Mere association does not make a conspiracy.** There must be evidence of some participation or interest in the commission of the offense."

In *Jensen v. Superior Court*, 96 Cal. App. 2d 112, 214 Pac. 2d 828, it is said:

"Where the evidence is wholly circumstantial and in every respect is reasonably consistent with innocence, the mere fact that the circumstances may also be reconciled with guilt will not justify an indictment. The Grand Jury may not resolve all implications in favor of guilt by substituting the presumption of guilt for one of innocence."

In the case just cited, the District Court of Appeal of the State of California for the Second District issued a peremptory writ of prohibition to restrain the Superior Court from trying the case for the reason that the defendant had been indicted without reasonable or probable cause. Yet the evidence in that case was far stronger than in the case at bar.

In conclusion, the appellant, Ong Way Jong respectfully submits that if the inadmissible hearsay evidence and the illegally obtained evidence were rejected in this matter, as it properly should have been, the United States Government would not prove its alleged case of conspiracy against the appellant beyond a reasonable doubt, and in fact, would not prove its case by even a preponderance of the evidence. This conclusion is based upon the fact that if the said illegally obtained evidence and improper hearsay evidence is rejected, the following constitutes the evidence in its entirety as introduced against the appellant and purports to show that the appellant is guilty of the offenses as charged, and this appellant respectfully submits that as a matter of law, the evidence is insufficient to justify judgment:

1. The Government witness, Bruce E. Hipkins, a Federal Narcotics Agent, testified that on February 1, 1956, at about 2:15 p.m., the co-defendant drove to appellant's home and later left; that on the same date at 3:55 p.m. the said Hipkins saw this appellant driving an automobile and that the co-defendant was riding in this appellant's automobile; that at 8:30 p.m. an automobile resembling this appellant's automobile

was seen in the vicinity of where the co-defendant was; that at 10 p.m. the same evening, two of them walked across the street into a doorway (the appellant allegedly carrying a child in his arms); that on February 7, 1956, the co-defendant went to Bay Meadows Racetrack and the appellant was seen with him and further on the same day the co-defendant went to appellant's home and later the co-defendant went to the appellant's automobile.

2. The Government witness, Eldon R. Prziborowski, testified that on February 1, he saw this appellant riding in an automobile with the co-defendant and later saw this appellant's automobile driving away; that later this appellant's car returned to the same scene and the appellant with a child in his arms crossed into a doorway with the co-defendant and one minute later the co-defendant left.

3. John A. Stenhouse, a Treasury Agent of the United States Government, testified on behalf of the Government, that he saw the appellant and the co-defendant at the Bay Meadows Racetrack in the afternoon on February 7, 1956; that on February 6 he saw the co-defendant and the appellant at the Cadillac Agency in San Francisco looking at automobiles; that on February 8 the co-defendant and appellant drove away from the appellant's home together.

4. Daniel P. Albee, a Cadillac automobile salesman, testified for the Government and stated that the appellant was at his offices during the time the hereinabove mentioned Federal Agents testified that the

appellant was at the Bay Meadows Racetrack with the co-defendant.

The above evidence constitutes the only admissible evidence against the appellant on the charge of conspiracy and it is appellant's contention that the admission of the illegally obtained evidence without a search warrant and the inadmissible hearsay evidence which was admitted at the trial of this action together with the admission of evidence relating to prior transactions of the co-defendant together with evidence which was admitted concerning transactions on or about the 21st day of February, 1956, which evidence was admitted only as against the co-defendant constituted prejudicial error which deprived this appellant of a fair and just trial. The appellant submits that there is a lack of any showing of a conspiracy and/or of the commission of an Overt Act in the perpetration of a conspiracy.

II.

THE DISTRICT COURT ERRED IN DENYING THE MOTIONS OF APPELLANT FOR A JUDGMENT OF ACQUITTAL.

The decisions supporting this contention have been fully set forth in the preceding subdivision of this brief.

III.

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S
MOTION FOR A NEW TRIAL.

The decisions in support of this contention, so far as the sufficiency of the evidence is involved, have been heretofore set forth in subdivision I of the Argument in this brief; and insofar as errors in the reception of evidence are involved, they will be set forth in the next succeeding section.

IV.

THE TRIAL COURT ERRED IN ADMITTING, OVER THE OBJECTION OF APPELLANT, THE HEARSAY TESTIMONY OF MILTON K. WU AS TO HIS DEALINGS AND CONVERSATIONS WITH THE ALLEGED CO-CONSPIRATOR, WEE ZEE YEP, ALL OF WHICH WERE OUT OF THE PRESENCE OF THE APPELLANT, WHOM THE WITNESS TESTIFIED THAT HE NEVER SAW AT ANY TIME PRIOR TO HIS ARREST.

It should be wholly unnecessary to argue that the existence of a conspiracy and appellant's alleged participation therein, could not be established by any narrative or anticipatory statements of Yep, made out of the presence of the appellant.

"To render evidence of the acts or declarations of an alleged conspirator admissible against an alleged co-conspirator, the existence of the conspiracy must be shown and the connection of the latter therewith established."

Minner v. United States, 57 Fed. 2d 506, 511,
citing *Pope v. United States*, 289 Fed. 312,
315;

Kelton v. United States, 294 Fed. 491, 495;

Isenhouer v. United States, 256 Fed. 843;
United States v. Richards, 149 Fed. 443;
Burns v. United States, 279 Fed. 982;
Stager v. United States, 233 Fed. 510.

Also cited by the Court in the *Minner* case is the opinion of this Court in *Dolan v. United States*, 123 Fed. 52, in which it was held that declarations, tending to show the existence of a conspiracy between the person making them and the person to whom they were made, were inadmissible against a third person not shown to have been connected with the alleged conspiracy. To state the matter otherwise,—the connection of the defendant with the conspiracy cannot be established by the acts and declarations of his alleged co-conspirators.

In *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L. Ed. 680, the Supreme Court of the United States, dealing with the contention made by the Government that the declarations of one conspirator in furtherance of the objects of the conspiracy made to a third party are admissible against his co-conspirators, uses this language at 315 U.S. 74, 62 S.Ct. 467:

“Such declarations are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof aliunde that he is connected with the conspiracy. **Otherwise hearsay would lift itself by its own bootstraps to the level of competent evidence.**”

In the comparatively recent case of *Krulewitch v. United States*, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed.

790, the Supreme Court of the United States reversed a conviction of violating the so-called Mann Act for the admission in evidence of a conversation had between the prosecutrix and a woman who was an alleged co-conspirator with the defendant in which it was claimed that the latter made statements which implied that the defendant was guilty of the crime for which he was on trial.

In the majority opinion of the Court written by Justice Black we read the following language:

“It is beyond doubt that the central aim of the alleged conspiracy—transportation of the complaining witness to Florida for prostitution—had either never existed or had long since ended in success or failure when and if the alleged co-conspirator made the statement attributed to her. Cf. *Lew Moy v. United States* (CCA 8th) 237 Fed. 50. The statement plainly implied that petitioner was guilty of the crime for which he was on trial. It was made in petitioner’s absence and the Government made no effort whatever to show that it was made with his authority. The testimony thus stands as an unsworn, out-of-court declaration of petitioner’s guilt. This hearsay declaration, attributed to a co-conspirator, was not made pursuant to and in furtherance of objectives of the conspiracy charged in the indictment, because, if made, it was after those objectives either had failed or had been achieved. Under these circumstances, the hearsay declaration attributed to the alleged co-conspirator was not admissible on the theory that it was made in furtherance of the alleged criminal transportation undertaking. *Fiswick v. United States*, 329

U.S. 211, 216, 217, 91 L. Ed. 196, 200, 201, 67 S.Ct. 224; *Brown v. United States*, 150 U.S. 93, 98, 99, 37 L. Ed. 1010, 1013, 14 S.Ct. 37; *Graham v. United States* (CCA 8th, Okla.) 15 Fed. 2d 740, 743."

In *Fiswick v. United States*, 329 U. S. 211, 67 S.Ct. 224, 91 L. Ed. 196, it is held (syllabus 1. (3)) that a

"confession or admission by one co-conspirator after he was apprehended was not in furtherance of the conspiracy to deceive the Government, but had the effect of terminating the conspiracy, so far as he was concerned, and made his admissions inadmissible against his erstwhile fellow-conspirators."

Independent of the evidence complained of, there is no proof connecting appellant with any alleged conspiracy, or with any other crime.

V.

THE TRIAL COURT ERRED IN ADMITTING IN EVIDENCE ALLEGED ACCUSATORY STATEMENTS MADE IN THE PRESENCE OF THE APPELLANT AS TESTIFIED TO BY THE WITNESS HIPKINS.

No rule of law is better settled than the rule that hearsay declarations are nonetheless hearsay because uttered in the presence of the defendant. In the Federal Courts, the general rule is that one who is in custody charged with a crime, is under no duty to deny an accusatory statement made in his presence, because he has the constitutional right to stand mute,

and any statement that he may make is always evidence against him and never evidence in his favor.

In *Yep v. United States*, 83 Fed. 2d 41, it is said:

“When one is under arrest or in custody charged with crime, he is under no duty to make any statement concerning the crime with which he stands charged; and statements tending to implicate him, made in his presence and hearing by others when he is under arrest or in custody, although not denied by him, are not admissible against him.”

In *McCarthy v. United States*, 25 Fed. 2d 298, the Circuit Court of Appeals of the Six Circuit says:

“Where accusatory statements are made in the presence of a respondent and not denied, the question whether his silence has any incriminating effect depends upon whether he was under any duty or any natural impulse to speak. Sometimes or often, in the earlier stages of the matter, there may be such a duty or impulse; but, after the arrest and during the official examination, while respondent is in custody, it is common knowledge that he has a right to say nothing. Only under peculiar circumstances can there seem to be any duty then to speak. Lacking such circumstances, to draw a derogatory inference from mere silence is to compel the respondent to testify; and the customary formula of warning should be changed, and the respondent should be told, ‘If you say anything, it will be used against you; if you do not say anything that will be used against you.’ See comments of Shaw, C. J. in *Com. v. Kenny*, 12 Mete. (53 Mass. 235, 46 Am. Dec. 672; *Com. v. Walker*, 13 Allen (Mass.) 470;

Com. v. McDermott, 123 Mass. 440, 25 Am. Rep. 120; *Porter v. Com.* (Ky), 61 S.W. 16, 17, and citations; *State v. Weaver*, 57 (Iowa) 730, 11 N.W. 675. Also comment of Judge Learned Hand in *Di Caralo v. United States*, (C.C.A. 2), 6F 2d 364, 366."

In *Merriweather v. Commonwealth*, 118 Ky. 870, 92 S.W. 592, it is said by the Kentucky Court of Appeals:

"One cannot be compelled, when not offering himself as a witness in his own defense, to give evidence in court tending to incriminate himself. Much less should he be compelled to do so out of court. If silence in such case is evidence of guilt, then one charged with crime must, under penalty of himself creating most damaging evidence against himself in support of the charge, enter into a controversy of words with ever idle straggler who may choose to accuse him to his face. He must parry every cross-examination attempted by every self-appointed questioner. He must, though not addressed, continually shout a denial of every fugitive statement tending to implicate him that may reach his ears. He must hazard answering accurately every statement so made, or have his silence construed as evidence of his having admitted not only what the witness then said, but possibly now says was then said. Courts have been called upon to apply such facts to that part of the rule above quoted, which says that the accused must not only have an opportunity to respond to the statement sought to be fastened upon him as an admission, but that the circumstances must be such as 'naturally and

properly call for some action or reply from men similarly situated.' ”

The question was definitely and finally settled by this Court in *Poole v. United States*, 97 Fed. 2d 423, reversing a conviction in a narcotics case for the admission in evidence of an accusatory statement made in the presence of the defendant, and the refusal to strike the said testimony from the record.

VI.

THE GOVERNMENT OFFICERS WERE AGENTS PROVOCATEUR AND THE CONVICTION CANNOT BE SUSTAINED.

In support of this contention we need only refer to the testimony of Agent Wu. It appears that the agent constantly insisted that Yep procure narcotics from him, offering money and resorting to repeated importunities and cajolery in order to procure the prohibited drug and to make an arrest.

The Courts of this country, without dissent, have established the rule that public policy prohibits the conviction and punishment of those who have been induced and persuaded to violate the law by public officers. This rule is often referred to by judges and lawyers as **the doctrine of entrapment**. The phrase is unfortunate, misleading and inaccurate. Entrapment of a criminal is legal. The police may set decoys to catch him. They may act the part of feigned accomplices, apparently acquiescing in the commission of the offense, conceived and in process of execution

by the criminal. **But they cannot create crime; they cannot make criminals.** The English language, powerful as it is, contains no word or phrase which aptly describes the police spy who suggests and importunes the violation of the law. We must resort to the French, in which such a person is designated as an **agent provocateur**—one who provokes or creates the crime. That loathsome calling has been aptly characterized by Lord Macaulay in his Essay on Barere as “an occupation compared to which the life of a beggar, of a pickpocket or of a pimp would be honorable.”

Both State and Federal Courts have condemned such conduct as that of the officer in the case at bar in unmeasured terms. It has been characterized by Chief Justice Campbell of the Supreme Court of Michigan, in *People v. McCord*, 76 Mich. 200, 42 N.W. 1106, as “a diabolical business which, if not punished, probably ought to be”, and again as, “a disgrace to the law”, and as “scandalous and reprehensive.”

In *Love v. People*, 160 Ill. 501, 32 L.R.A. 139, 43 N.E. 710, the Court said:

“Strong men are sometimes unprepared to cope with temptation and resist encouragement to evil when financially embarrassed and impoverished.”

In the earlier case of *Saunders v. People*, 38 Mich. 218, 221, the Court reprobates and disapproves the suggestion by officers made even to a person under suspicion, that he violate the law. The eloquent words of Judge Marston are not only worthy of quotation

but are a moral sermon which should be heeded by every officer of the law:

“The course pursued by the officers in this case was utterly indefensible. . . . **Human nature is frail enough at best, and requires no encouragement in wrong-doing. If we cannot assist another and prevent him from violating the laws of the land, we at least should abstain from any active efforts in the way of leading him into temptation.** Desire to commit crime and opportunities for the commission thereof would seem sufficiently general and numerous, and no special efforts would seem necessary in the way of encouragement or assistance in that direction.”

In *Casey v. United States*, 276 U. S. 413, 48 S.Ct. 373, 74 L. Ed. 632, the Supreme Court of the United States, by a bare majority of five to four, affirmed the conviction because the question of entrapment had not been raised in the trial Court. In point of fact, it was raised for the first time in the reply brief filed by appellant in the Circuit Court of Appeals. Nevertheless, Justice Brandeis, in a dissenting opinion, which has later been cited as authority in prevailing opinions (see *Sorrells v. United States*, 287 U.S. 435), held, and we think held correctly, that the question could never be raised too late because the rule is one of public policy designed, **not for the protection of the defendant, but for the protection of society.**

“Their conduct is not a defense to him. For no officer of the government has power to authorize the violation of an act of Congress, and no conduct of an officer can excuse the violation. But

it does not follow that the court must suffer a detective-made criminal to be punished. To permit that would be tantamount to a ratification by the government of the officer's unauthorized conduct. . . . **This prosecution should be stopped . . . in order to protect the government. To protect it from illegal conduct of its officers. To preserve the purity of its courts."**

The cases which condemn the instigation of crime by officers, and hold that convictions obtained by such methods cannot stand, are so numerous and are so familiar to all practicing lawyers or members of the legal profession, who possess even an elementary knowledge of criminal law, that mere citation of the leading decisions will be sufficient:

United States v. Adams, 59 Fed. 674;

Woo Wai v. United States, 223 Fed. 412;

Sam Yick v. United States, 240 Fed. 60;

Peterson v. United States, 255 Fed. 433.

These four decisions **are by this Court**, and are therefore entitled to peculiar respect. Among the numerous other decisions are:

Voves v. United States, 249 Fed. 191;

Newman v. United States, 299 Fed. 128;

Capuano v. United States, 9 Fed. 2d 41;

Silk v. United States, 16 Fed. 2d 568;

Jorl v. United States, 19 Fed. 2d 891;

Cline v. United States, 20 Fed. 2d 494;

United States v. Washington, 20 Fed. 2d 160.

See also: *Butts v. United States*, 273 Fed. 35, which is characterized as "the leading case" by Chief Jus-

tice Hughes in *Sorrels v. United States*, 287 U.S. 435, 53 S.Ct. 210, 77 L. Ed. 413, in which the rule is reiterated with the citation of many earlier authorities.

The language of Circuit Judge Sanborn, in *Butts v. United States*, *supra*, is decisive of the question presented by the case at bar:

“The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it. Here the evidence strongly tends to prove, if it does not conclusively do so, that their first and chief endeavor was to cause, to create, crime in order to punish it, and it is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it.”

Newman v. United States (C.C.A. 4th), 299 Fed. 131, will also bear quotation:

“It is well settled that decoys may be used to entrap criminals, and to present opportunity to one intending or willing to commit crime. But decoys are not permissible to ensnare the innocent and law-abiding into the commission of crime. When the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act,

and government is estopped by sound public policy from prosecution therefor.”

We submit that it is high time that the Courts put an end, once and for all, to the scandalous, disgraceful, and all too common practice of officers and agents who deliberately create crime in order to make arrests and secure convictions for the purpose of establishing a record for efficiency, if not, indeed, from baser motives. Such methods should not be sanctioned by any American Court, and the only way to put an end to their employment is to reverse convictions so obtained.

CONCLUSION.

It is respectfully submitted that, other than the incompetent evidence erroneously admitted, there is not a scintilla of evidence to sustain the charge. Even with the incompetent evidence, we have nothing here to show that appellant supplied Yep with the narcotics which the latter sold to the officer, or that he was a party to any conspiracy to commit any of the offenses mentioned in the third count of the indictment. For the errors herein alleged, and for the abhorrent conduct of the officers of the Government, it is respectfully submitted that the judgment appealed from should be reversed, and the cause remanded to the District Court with directions to dismiss the in-

dictment against appellant, and to discharge him therefrom.

Dated, San Francisco, California,
November 14, 1956.

HERRON & WINN,
By FRED R. WINN,
Attorneys for Appellant.

IN THE
United States Court of Appeals
For the Ninth Circuit

VS.

UNITED STATES OF AMERICA,
Appellee.

LLOYD H. BURKE,
United States Attorney,
DONALD B. CONSTINE,
Assistant United States Attorney,
RICHARD H. FOSTER,
Assistant United States Attorney,
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PAUL P. O'BRIEN, CLERK



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No. 15,178

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ONG WAY JONG, alias Johnny Ong,
and WEE ZEE YEP,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

Jurisdiction is invoked under Title 18 United States Code, Section 3231, Title 28 United States Code, Sections 1291 and 1294, and the Sixth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE.

Appellant and his co-defendant Wee Zee Yep were indicted on March 7, 1956 in three counts for violation of the narcotic laws of the United States (Tr. 3-6). The first count charged the defendant Yep individually with selling 1 ounce, 36 grains of heroin. The second count charged the defendant Yep with concealing and

facilitating the concealment of the same amount of heroin. The third count charged both the defendants with conspiring to sell, conceal and transport narcotic drugs. On March 15, 1956 the appellant Ong Way Jong plead not guilty (Tr. 8). Defendant Yep pleaded guilty to count two, but not guilty as to counts one and three, on March 19, 1956 (Tr. 9). On April 20, 1956 both defendants waived trial by jury (Tr. 6-7) and on April 25, 1956 both defendants were tried by the court, United States District Judge Michael J. Roche presiding (Tr. 23). After evidence was introduced on behalf of the government, appellant Ong Way Jong testified in his own behalf (Tr. 175). Defendant Yep elected not to take the stand. Judge Roche, after hearing argument by counsel for the government and defense, found both defendants guilty of all counts (Tr. 213). In connection with the court's findings, Judge Roche made the following remarks:

“The Court: There is much to be said in your relation to this case, but I am in doubt about it being helpful in any way. But on the theory of the defense here I would have to disbelieve all the testimony of the witnesses for the Government. On the other hand, in appraising the witnesses here, and particularly the defendants themselves, I can [sic] understand how from their testimony I couldn't [sic] possibly give it the credence that I could the other witnesses, and for that reason I find both of the defendants guilty as charged in the indictment in counts 1, 2 and 3.”

Thereafter, after a motion for a new trial was denied, (Tr. 10) the court sentenced appellant to a term of five years and fined him the sum of \$1.00 (Tr. 10).

Appeal was then timely made to this court (Tr. 18). Defendant Yep also appealed. However, this court dismissed the appeal for lack of prosecution on September 19, 1956 (Tr. 21). Appellant Ong Way Jong, therefore, is the only defendant before the court.

Defendant Ong had been previously convicted of possession of narcotics in Los Angeles in 1951 (Tr. 190). He had been unemployed for a year prior to the narcotic transaction of February 1, 1956 (Tr. 92-148). Shortly after the narcotic transaction Ong purchased a new 1955 Cadillac, making a cash payment of \$1600 (Tr. 127-129). During the transaction itself Mr. Jong utilized his 1951 Cadillac (Tr. 115, 104, 1943). The only explanation Ong could give for his expensive automobiles, expensive clothes and home was that his source of income was from gambling (Tr. 92-148).

Appellant's co-defendant Yep has sold Agent Wu two ounces of heroin which he had obtained from another connection on January 23, 1956 (Tr. 42-43). During the progress of this sale Yep disclosed that he had several sources for narcotics (Tr. 39-40). Yep explained that the connection for the January 23 sale was a white seaman (Tr. 39-40). When asked by Agent Wu to telephone his local connection Yep replied that he could not do so because his connection did not have a telephone (Tr. 54). It is interesting to note that at the time of appellant's arrest it was discovered that appellant had no telephone (Tr. 148).

On February 1st a second purchase of narcotics from defendant Yep was discussed at agent Wu's apartment

at about two o'clock in the afternoon (Tr. 45). Yep stated that he would leave the apartment and go directly to his "friend" and return with the narcotics (Tr. 45). When Yep left the apartment he was followed by Narcotic Agents Stenhouse, Prziborowski, and Hipkins directly to the residence of defendant Jong, 83 Winfield Street, San Francisco (Tr. 111, 101, 102, 80). Shortly thereafter the defendant Yep left appellant's apartment and drove to Mason and Jackson Streets (Tr. 80). The agents further testified that at approximately 3:55 P.M. appellant drove his 1951 Cadillac to this intersection (Tr. 112, 102, 81, 82). Yep left his car and entered that of appellant's (Tr. 80). The two defendants were observed conversing for a short period of time (Tr. 112). Then the defendant Yep left the Cadillac and entered his Mercury vehicle, and drove to Agent Wu's apartment at 225 Chestnut Street (Tr. 112).

At the apartment Yep informed Wu that his original offer for narcotics was low, and that he could not get it for Wu for less than \$600.00 per ounce (Tr. 46). A meeting was arranged for eight o'clock at Compton's Restaurant (Tr. 47). At about 7:30 Yep and Ong were observed to meet in appellant Jong's 1951 Cadillac on John Street (102-103, 83). After a few moment's conversation the defendant Yep left defendant Ong and was followed by Agents Stenhouse and Wolski to Compton's Restaurant on Van Ness Avenue, where he met Agent Wu (Tr. 114-142) at 8:15. Yep told Wu that he was still negotiating for delivery, that he was sure he could make it later that evening (Tr. 47).

Following this conversation Yep was followed by Narcotic Agents to Jackson and Mason Streets, where he met appellant Ong (Tr. 114, 115, 103, 142, 143). After a few moments conversation appellant left this location, and was gone for approximately 1 hour (Tr. 104, 143). The defendant Yep remained in view of the agents at all times (Tr. 104, 105, 84, 85, 143). At approximately 9:30 P.M. he was observed entering a drugstore by Agent Wolski (Tr. 143). Agent Wu testified that he received a telephone call from Yep at approximately 9:30 P.M. In this telephone call Yep told Wu that the narcotic delivery would be made within the hour, and that Yep was then waiting for his "connection" to return with the heroin (Tr. 47-48).

At approximately 10 o'clock narcotic agents observed appellant Ong returning to the vicinity of Jackson and Mason Streets in his Cadillac (Tr. 115, 104, 105, 85, 143, 144). During the period from the telephone call to Wu and the arrival of Ong, Yep apparently paced back and forth from the intersection at Jackson and Mason Streets (Tr. 115). At Ong's arrival, Yep joined him in the entrance way of 1003 Jackson Street (Tr. 115, 105, 85, 143, 144). The agents observed appellant with a small child in his arms at the time of his meeting with Yep (Tr. 115, 105, 85, 143, 144). After a meeting from thirty seconds to a minute Yep left Ong (Tr. 115, 116, 105, 85, 144). The agents then saw Yep go directly to Agent Wu's apartment at 225 Chestnut Street (Tr. 116). There, Agent Wu testified, he delivered the

heroin in return for \$600.00 of government advance funds (Tr. 48, 49). Following receipt of the money the defendant Yep was followed by agents back to Jackson and Mason Streets, where he met appellant Ong (Tr. 105, 85, 86). Surveillance was then discontinued (Tr. 86).

On February 7, 8, 13 and 17 negotiations were conducted for another sale of heroin (Tr. 53, 54). On February 7th Yep called Agent Wu and told him he had placed an order for him (Tr. 51). Yep informed Wu that the connection was at that time playing Mah Jong, and that he, Yep, would join him to confirm Wu's order (Tr. 51, 52). At 9:15 that evening Agent Hipkins saw Yep and appellant Ong leaving a Mah Jong game room at 31 Spofford Alley in Chinatown (Tr. 88). On the 8th of February at about noon Yep told Wu that he was with his "connection" and was attempting to obtain the narcotics that Wu had ordered (Tr. 53). On February 8th, Agent Stenhouse observed Yep go to Johnny Ong's residence at 83 Winfield Street (Tr. 121). He then saw the two defendants enter appellant's new 1955 Cadillac and drive off (Tr. 122). Both defendants were still together at approximately 3:15 that afternoon (Tr. 122). Later that evening Yep called Wu and indicated that he could not make delivery at that time (Tr. 53).

On February 13th Yep and Wu again had conversation in which the agent complained about the long delay (Tr. 53). Wu questioned the reliability of Yep's connection. Yep said he would try again to see that "man" and obtain narcotics for Wu (Tr. 54).

Later that evening Yep telephoned Agent Wu (Tr. 55). Wu overheard a conversation with someone called Johnny, and then Yep informed Wu he could not deliver that night (Tr. 56).

On the 17th day of February Yep informed Wu that he required payment in advance (Tr. 56). Wu demurred to this arrangement (Tr. 56). Yep offered to secure his "connection's" 1955 Cadillac as collateral (Tr. 56). Wu said, however, that he must have the narcotics before he paid his money (Tr. 56). On the 19th, after further questioning by Wu as to the reliability of his connection, Yep stated that he was expecting a shipment by ship, and on the 21st Yep supplied a pound of narcotics which he obtained from a connection other than Johnny Ong (Tr. 60).

Appellant Ong was questioned and arrested on February 21, 1956 (Tr. 88, 146). At that time he was questioned concerning his association with Yep (Tr. 91). Ong made no reply to any of the questions or accusations of Agent Hipkins (Tr. 22). When questioned as to his source of income in connection with his home, Cadillacs and expensive clothes, the defendant stated only that he gambled (Tr. 92, 148). He admitted that he had been unemployed for a year (Tr. 92, 148). He would not answer any questions concerning his activities on the night of February 1 (Tr. 147).

On direct examination Ong testified that he did not answer the agent's questions because he did not want his friend Yep to become involved (Tr. 178). On cross-examination, however, testified that he had

remained silent in order to protect himself (Tr. 189). On the timing of his version of events of February 1st, he said that about 6:30 o'clock he had taken his 18-month-old son to a barber in order to get him a haircut (Tr. 181). The barber wasn't there (Tr. 182). He then left the barber shop for a period of time, and returned at 7:00 o'clock (Tr. 182). He then left the barber shop once again and met Rocky Yep (Tr. 182). Thereafter he went again to the barber shop and found his barber busy (Tr. 184). He left the barber shop again and went to Lucy's place (Tr. 184) and watched TV (Tr. 184). Then he went back to the barber shop again with his little boy Kelvin (Tr. 185). At about ten o'clock, apparently, he finally got the 18-month-old child a haircut (Tr. 185), and he left the barber shop again.

He then went to play Mah Jong (Tr. 186). At that time he met Yep again. It was his testimony that he entered the Fong residence with Yep, where they both played Mah Jong (186). His 18-month-old baby was still with him (Tr. 195). About 11 o'clock, with the child apparently still at the Mah Jong game, Johnny Ong met Yep. After this meeting it apparently occurred to Ong, according to his testimony, that it was late, and he thought of taking the child to dinner (Tr. 186). He denied supplying Yep with narcotics (186).

Judge Roche did not believe his story, and found both him and Yep guilty on all counts (Tr. 213).

QUESTIONS PRESENTED.

1. Was evidence improperly admitted?
 2. Is the evidence sufficient?
 3. Was appellant illegally entrapped?
 4. Was appellant's conversation at the time of his arrest admissible?
-

ARGUMENT.**I.****NO ERROR WAS COMMITTED IN THE
RECEPTION OF EVIDENCE.**

Appellant in point 4 of his argument (at page 55) argues that declarations of appellant's co-defendant Yep should not have been admitted.

Appellant nowhere identifies the particular testimony to which his objection is directed. Without this identification it is impossible to determine what, if any, part of Yep's testimony appellant objects. The government does not propose to examine and argue each bit of the Yep testimony with a view to demonstrating its admissibility.

It must be remembered that the defendant Wee Zee Yep was tried with appellant. Necessarily evidence was admitted against him which would not be admissible against appellant. Certain evidence admitted during the course of the trial shed light upon the defendant Yep's intent. Appellant, however, has not advised the court as to whether he objects to the ad-

mission of this evidence or to other evidence which was admitted and was admissible, in the government's view, in proof of the conspiracy charge of the indictment.

The evidence in proof of a conspiracy will generally, from the nature of the case, be circumstantial. A common design is the essence of the charge, and such design may be made to appear when the defendants and co-conspirators steadily pursue the same object whether acting separately or together by common or different means, all leading to the same unlawful result. If it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same so as to complete it, with a view to the attainment of that same object the trier of the fact is justified in the conclusion that such persons were engaged in a conspiracy.

Chadwick v. United States, 141 Fed. 225, 251;

Allen v. United States, (9th Cir.) 4 F. 2d 688, 691;

Coates v. U.S., 59 F. 2d 173, 174.

In a conspiracy charge, if the government shows that the defendant acted in concert in pursuance of a common design, the crime of a conspiracy is made out.

American Tobacco Company v. United States, 328 U.S. 781;

Marino v. United States, (9th Cir.) 91 F. 2d 691.

Since a conspiracy requires two persons or more it follows that acts done by others in pursuance of its

object must be admissible against a defendant in order that his connection with the conspiracy may be shown. Any declarations, therefore, by co-conspirators, which tend to show a concert of action between them is admissible against them, even though all the conspirators are not present at the time of the declaration. In order to show a concert of action the acts and declarations of Yep must be considered in conjunction with the acts and declarations of appellant.

In point 4 of his argument appellant has made some general statements from various cases concerning the law of conspiracy. He has not made any argument, however, demonstrating that the proof in the instance case was in any particular inadmissible against him.

In this case, on February 1st, a sale of narcotics was completely consummated. Agents of the Bureau of Narcotics traced defendant Yep from his agreement to sell to Agent Wu until he delivered the heroin back to Agent Wu's apartment at 225 Chestnut Street (Tr. 48-49). The proof showed that Yep contacted no one except appellant during the time he secured the narcotics for Agent Wu. Following the receipt of the \$600 of government money he returned immediately to appellant Johnny Ong (Tr. 105, 85, 86).

To be sure, if the evidence admitted showing that Yep had contracted with Agent Wu for a sale to Wu of heroin had not been admitted, the proof against appellant would have fallen because evidence of appellant's acts became meaningful only in conjunction

with the acts of his co-conspirator. It is not necessary, however, to constitute a conspiracy, to violate the narcotic laws, that all conspirators deliver the narcotics, or that all conspirators contract for the narcotic sale. The proof in this case clearly showed that appellant was the source, the "connection" from which the peddler Yep secured narcotics.

In a conspiracy case, as has been stated above, evidence of the acts and declarations of co-conspirators are necessarily admissible against a defendant for the light they throw on the defendant's conduct. If his conduct, in conjunction with theirs, shows the necessary concert of action, the conspiracy charge is made out. Just as it takes the evidence of the two parties to prove a contract, it takes evidence of at least two co-conspirators to prove a conspiracy.

As stated above, the government is in some doubt as to what particular testimony appellant objects. It should be remembered, however, that this case was tried by the court instead of by jury. A court is presumed to have considered only that evidence which is properly admissible against each defendant.

Clauson v. U.S. (8th Cir.) 60 F.2d 694, 1932;

Anderson v. U.S. (8th Cir.) 65 F.2d 870, 1933.

The same safeguards which are necessary in a jury trial are not necessary in a trial before a United States District Judge. A jury composed of laymen might be misled by extraneous factors, which a court with long experience in the trial of criminal actions would disregard.

The order of proof in a conspiracy case is within the discretion of the court.

Newman v. U.S. (9th Cir.) 156 F.2d 8.

If appellants' point is that at some time during the trial appellants' connection with the conspiracy was not shown, then the simple answer to appellants' objection is that once the declarations of Yep were shown to be connected with the actions of appellant Ong, all evidence was properly admitted against appellant.

II.

THE EVIDENCE WAS SUFFICIENT.

In this case appellant's co-defendant Yep had had various negotiations with Narcotic Agent Wu leading toward the purchase of narcotics (Tr. 42-43). On January 23, Yep had sold two ounces of heroin to Wu from another "connection" (Tr. 42, 43). At the time of the sale, however, Yep made it clear that he had more than one source for narcotics (Tr. 39-40). On February 1 a sale with this other source was discussed with Agent Wu (Tr. 45). Yep made it plain that he could not telephone this connection (Tr. 54). Appellant had no telephone (Tr. 148). Yep, therefore, said he would go directly to his "friend" to secure the narcotics for Wu (Tr. 45). Yep then went directly to the residence of appellant (Tr. 111, 101, 102, 80). Thereafter there was another meeting between the two co-conspirators (Tr. 112). Then Yep left appellant Johnny Ong and went back to Agent

Wu's apartment (Tr. 112). At the apartment Yep informed Wu that his original offer was too low (Tr. 46). At no time was Yep observed to contact anyone else besides appellant. The only time he was out of the observation of the narcotic agents was when he was within Johnny Ong's home. The only place that Yep could have secured the information that Wu's offer was too low was from Johnny Ong.

Later that evening appellant and Ong were observed to meet again in appellant's 1951 Cadillac (Tr. 102, 103, 83). After a conversation Yep went to a pre-arranged meeting place where he met Wu at Compton's Restaurant (Tr. 114, 142). At that time Yep told Wu he was still negotiating for delivery for the \$600 price agreed upon. Then Yep met Ong again (Tr. 114, 115, 103, 142, 143). After this meeting Yep called Wu and told him that the narcotics delivery would be made within the hour, and that he, Yep, was waiting for his "connection" to return with the heroin (Tr. 47, 48). Approximately an hour later Ong returned to Jackson and Mason Streets (Tr. 115, 104, 105, 85, 143, 144). During the period from the telephone call until appellant's return Yep paced back and forth from the intersection at Jackson and Mason Streets, obviously waiting impatiently for Ong's return (Tr. 115). At Ong's arrival Yep joined him in the entrance of 1003 Jackson Street (Tr. 115, 105, 85, 143, 144). At the time the agents observed Ong with a small child in his arms (Tr. 115, 105, 85, 143, 144). It is interesting to note that the narcotic package was stained with what appeared to the agent to be diaper

stains (Tr. 91). After a meeting of from 30 seconds to a minute Yep left Ong and drove directly to Wu's apartment at 225 Chestnut Street, and delivered the heroin in return for \$600 (Tr. 116, 48, 49).

Once again Yep had contacted no one, except appellant Ong. The only source from which he could have obtained the heroin was Ong, just as before the only source from which he could have obtained the information that Wu's offer was too low was from appellant Johnny Ong. Furthermore, after he secured the \$600 he went immediately back to appellant Ong, obviously splitting the spoils (Tr. 105, 85, 86).

Shortly after the transaction appellant Ong, who had been unemployed for more than a year, purchased a new 1955 Cadillac (Tr. 127, 129). The only explanation appellant could offer for his expensive cars, clothes and home was that he gambled (Tr. 92, 148). Appellant's testimony at the trial was contradictory, and Judge Roche felt inherently improbable (Tr. 213). His explanation for his meetings with Yep was that he was taking his one and one-half year-old-child for a haircut (Tr. 182). It appeared that he had visited a barber shop around 7 or 8 times from about 7 o'clock until after 10 o'clock before he secured the haircut (Tr. 181 through 185). It was not until about 11 o'clock that it occurred to him that the child might be hungry (Tr. 186). He was contradicted by the agents concerning the length of his contact with Yep. Ong testified that he entered the Fong residence with Yep, where they both played Mah Jong (Tr. 186). He testified that Yep stayed within the house 5 to 10 minutes. The

agents, however, testified it to be but a brief meeting of 30 seconds to one minute (Tr. 115, 116, 105, 85, 144).

This court is not concerned with the weight of evidence. It does not constitute itself, as a trial jury, to retry the case. On appeal Appellate Courts adopt the inferences most favorable to the government's case.

Barcott v. United States (9th Cir.) 169 F.2d 921, 931, cert. denied;

Henderson v. United States (9th Cir.) 143 F.2d 681;

Gendelman v. U.S. (9th Cir.) 191 F.2d 993;

Glasser v. United States, 315 U.S. 60.

Evidence of appellant's guilt is clear. The evidence is more than sufficient. The evidence, although circumstantial, proves defendant's guilt beyond a reasonable doubt.

III.

THERE IS NO ENTRAPMENT.

The defense of entrapment is a defense of confession and avoidance. The defendant, although he admits committing the crime, argues that public policy prohibits his conviction because of the actions of the government agents. Here appellant denies his guilt.

As this court has said it logically follows that absent the commission of a crime and there can be no entrapment.

Eastman v. United States (9th Cir.) 212 F.2d 320, 322;

Bakotich v. United States (9th Cir.) 4 F.2d 386.

Furthermore, in this case the defense of entrapment was never even raised at the trial. Appellant is asking this court to constitute itself a trier of the fact and to examine the record with a view to deciding whether there was, in fact, entrapment in the instant case.

Appellant does not point to any testimony which would indicate that government agents sought to entice improperly appellant. He apparently is raising the issue of entrapment only with respect to his co-defendant Yep, who has not appealed and is not before the court. The testimony on which he relies, even as to Yep is not presented to the court. There is no case to our knowledge which has never held that a defendant may take advantage of another's entrapment to avoid the consequences of his own criminal acts.

In this case, even if there is such a thing as entrapment as a matter of law, which we doubt, the facts do not indicate in the slightest degree that the intent to commit a narcotic conspiracy originated in the mind of Agent Wu rather than the defendant Yep and appellant Ong.

See *Trict v. United States*, (9th Cir.) 211 F.2d 513, 1954;

Henry v. United States, 215 F.2d 639, 1954.

IV.

**APPELLANT'S CONVERSATIONS WITH THE NARCOTIC AGENTS
AT THE TIME OF HIS ARREST WERE ADMISSIBLE.**

At the time of his arrest appellant was interrogated (Tr. 89). He was asked whether he had a business or occupation, and he answered that he had been unemployed for the past year (Tr. 92). He was also asked how he could explain buying a house and paying cash for a Cadillac when he was not working. His only answer was that his income was derived from gambling. When accused of engaging in a narcotic transaction with Rocky Yep appellant made no answer (Tr. 92). It is this testimony which is the subject of appellant's arguments under point 5 of his brief, at page 58. It has long been held that when a defendant does not deny accusations, under circumstances that an innocent man would make some statement, that failure is admissible in evidence against him.

Gentili v. United States, (9th Cir.) 22 F.2d 67, 1927;

Rocchia v. United States, (9th Cir.) 78 F.2d 966, 1935.

Here, however, the agents' questions and appellant's answers were part of an integrated series of questions. The court was entitled to know all that transpired at the time of appellant's arrest. The government admits that mere silence in the face of an accusation is slight, if any, evidence of guilt. Here, however, appellant on the stand stated first that he was silent to protect Yep (Tr. 178) and then on cross-examination, that

he had remained silent in order to protect himself (Tr. 189). It is the evidence on the stand which the government argues is evidence of guilty knowledge. The evidence, at the time of appellant's arrest, is merely a portion of an interview which developed the very significant circumstances that appellant, although unemployed for the past year, could afford expensive Cadillacs and houses. This expenditure, in the absence of any reasonable explanation, tended to show (in conjunction with appellant's activities with Yep) an individual who was engaged in the narcotic traffic.

Appellant relies on the case of *Poole v. United States*, (9th Cir.) 97 F.2d 423, 1938. In that case the defendant had *denied* his guilt when accused. His co-defendant had stated at the time in question that the defendant was the person from whom she received the narcotics. This court held that the admission of her statement, even though coupled with his denial, was merely the admission of prejudicial hearsay, since the co-defendant had not testified at the trial. The situation in the *Poole* case is a far cry from the situation we have here. In this case the defendant made no denial after the accusation, and no prejudicial hearsay was admitted by indirect means as was the case in *Poole v. United States*, *supra*.

CONCLUSION.

In the instant case the question before Judge Roche was one of credibility. Appellant admitted being with defendant Yep during the progress of the narcotic transaction. The evidence showed that Ong was the only person from whom Yep could have secured the narcotics. He contradicted the evidence in significant parts of his testimony. The court was not required to believe the testimony of a felon previously convicted of a violation of the narcotic laws.

The judgment below should be affirmed.

Dated, San Francisco, California,
December 28, 1956.

LLOYD H. BURKE,
United States Attorney,

DONALD B. CONSTINE,
Assistant United States Attorney,

RICHARD H. FOSTER,
Assistant United States Attorney,
Attorneys for Appellee.



No. 15, 178

IN THE

United States Court of Appeals
For the Ninth Circuit

ONG WAY JONG, alias JOHNNY ONG,	}
<i>Appellant,</i>	
VS.	
UNITED STATES OF AMERICA,	
<i>Appellee.</i>	

APPELLANT'S REPLY BRIEF.

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FILED

JAN 18 1957

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No. 15,178

IN THE

United States Court of Appeals
For the Ninth Circuit

ONG WAY JONG, alias JOHNNY ONG,	}
vs.	
UNITED STATES OF AMERICA,	
	<i>Appellant,</i>
	<i>Appellee.</i>

APPELLANT'S REPLY BRIEF.

The brief of the appellee sets forth, insofar as argument is concerned, nothing but the *ipse dixit* of counsel for the Government. This is particularly true as to the first contention of appellant, which is discussed in the Brief of Appellee, to wit, that the trial Court committed error in admitting in evidence a vast mass of testimony consisting of conversations between the Government Agent Wu and Wee Zee Yep, the co-defendant of appellant, together with acts of the co-defendant and the agent, out of the presence of the defendant.

THE GOVERNMENT IGNORES THE DECISIONS OF THE
SUPREME COURT OF THE UNITED STATES AND OTHER
FEDERAL COURTS WHICH HOLD THAT A CONSPIRACY
CANNOT BE ESTABLISHED BY HEARSAY.

All of this evidence was admitted without any preliminary proof either of the existence of a conspiracy or of the connection of appellant therewith. Thus the most elementary principle of evidence, which excludes hearsay and *res inter alia acta*, was violated.

It should not be, but apparently it is, necessary to state that the mere fact that the defendant is charged with conspiring with another person to commit a crime does not open the flood gates which the sages of the law and the learned judge have erected against hearsay.

The rule is of course clear that where two or more persons enter into a conspiracy, the acts and declarations of one in furtherance of the conspiracy are binding upon his co-conspirators.

But it is only those acts in furtherance of the conspiracy which are binding upon those to whom the Government seeks to impute the words and deeds of another. The rule has never been better stated than in the opinion of Presiding Justice Cooper in *People v. Schmitz*, 7 Cal. App. 330, 94 Pac. 407:

“It is the policy of the law to exclude hearsay evidence with certain exceptions, well known to the profession. A defendant has the right to be confronted with the witnesses against him as to any act, matter or thing done or said by him, tending to connect him with the commission of an offense. His admissions, if he has made any, may

be received against him. His conduct and acts in many cases are admissible. If he has entered into a conspiracy the declaration of a co-conspirator during the continuance of the conspiracy and in furtherance of the common design is admissible in evidence. But the sages of the law and the learned judges have established the rule that the independent acts and declarations of one man shall not be evidence against another. It is sufficient for everyone to answer for his own sins, and not for the sins of his neighbor. The rule is thus laid down in our Code of Civil Procedure, section 1845: 'A witness can testify to those facts only which he knows of his own knowledge; that is, which are derived from his own perceptions, except in those few express cases in which his opinions or inferences, or the declarations of others, are admissible.' Section 1870 declares:

'Evidence may be given upon a trial of the following facts:

1. The precise fact in dispute.
2. The acts, declarations, or admissions of a party, as evidence against such party.
3. An act or declaration of another in the presence and within the observation of a party, and his conduct in relation thereto . . .
6. After proof of a conspiracy the act or declaration of a conspirator against his co-conspirator, and relating to the conspiracy.'

The evidence admitted does not come within any of the exceptions to the rule. . . . It is the rule well established that the admission of hearsay evidence that is injurious to a defendant is ground

for reversal. (People v. Griffin, 52 Cal. 616; People v. Gonzales, 71 Cal. 569 [12 Pac. 783]; People v. Hall, 94 Cal. 595 [30 Pac. 7]; People v. Hill, 123 Cal. 571, [56 Pac. 443]; People v. Landis, 139 Cal. 426 [73 Pac. 153].)''

The California statute quoted in the opinion of the learned Presiding Justice in the *Schmitz* case is but a statutory enactment of the well established and time honored rules of evidence. Indeed, the rules of evidence pronounced in the fourth part of the California Code of Civil Procedure are, for the most part, and with certain exceptions of which this is not one, a statutory enactment of the first volume of *Greenleaf On Evidence*. The same rule has been followed by the Supreme Court of the United States in *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L. Ed. 680, from which we quoted in appellant's opening brief:

"Such declarations are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof aliunde that he is connected with the conspiracy. *Otherwise hearsay would lift itself by its own bootstraps to the level of competent evidence.*"

Also in appellant's opening brief, commencing at page 56, we cited with quotation the majority opinion of the high Court, written by Mr. Justice Black in *Krulewitch v. United States*, 336 U.S. 440, 69 S. Ct. 716, 93 L. Ed. 790, in which the conviction was reversed for the admission in evidence of a conversation between the prosecutrix and a woman who was an al-

leged co-conspirator with the defendant, in violating the so-called Mann Act:

“It is beyond doubt that the central aim of the alleged conspiracy—transportation of the complaining witness to Florida for prostitution—had either never existed or had long since ended in success or failure when and if the alleged co-conspirator made the statement attributed to her. Cf. *Lew Moy v. United States* (CCA 8th) 237 Fed. 50. The statement plainly implied that petitioner was guilty of the crime for which he was on trial. It was made in petitioner’s absence and the Government made no effort whatever to show that it was made with his authority. The testimony thus stands as an unsworn, out-of-court declaration of petitioner’s guilt. This hearsay declaration, attributed to a co-conspirator, was not made pursuant to and in furtherance of objectives of the conspiracy charged in the indictment, because, if made, it was after those objectives either had failed or had been achieved. Under these circumstances, the hearsay declaration attributed to the alleged co-conspirator was not admissible on the theory that it was made in furtherance of the alleged criminal transportation undertaking. *Fiswick v. United States*, 329 U.S. 211, 216, 217, 91 L. Ed. 196, 200, 201, 67 S. Ct. 224; *Brown v. United States*, 150 U.S. 93, 98, 99, 37 L. Ed. 1010, 1013, 14 S. Ct. 37; *Graham v. United States* (CCA 8th Okla.) 15 Fed. 2d 740, 743.”

In *Fiswick v. United States*, 329 U.S. 211, 67 S. Ct. 224, 91 L. Ed. 196, it is held (syllabus 1. (367) that a “confession or admission by one co-conspirator after he was apprehended was not in furtherance

of the conspiracy to deceive the Government, but had the effect of terminating the conspiracy, so far as he was concerned, and made his admissions inadmissible against his erstwhile fellow-conspirators.”

These decisions of the Supreme Court of the United States are, we think, sufficiently high authority to render it unnecessary to discuss decisions of the various circuit Courts of appeals, including that of this Court in *Dolan v. United States*, 123 Fed. 52, in which it was held that declarations tending to show the existence of a conspiracy between the person making them and the person to whom they were made were inadmissible against a third person not shown to have been connected with the alleged conspiracy. Once again, however, we direct the attention of the Court to the extremely learned and comprehensive opinion in *Minner v. United States*, 57 Fed. 2d 506. It is true, as stated by counsel for the Government, that proof of a conspiracy must in many cases be made with but circumstantial evidence. It is not necessary to offer direct evidence that the conspirators sat down together, specifically entered into an agreement to commit a crime, and worked out the details by which the same would be committed. The character of the circumstantial evidence which will justify a finding that a conspiracy existed is not very accurately stated, however, by counsel for the Government, who say at page 10 of the Brief for Appellee:

“A common design is the essence of the charge, and such design may be made to appear when the defendants and co-conspirators steadily pursue

the same object whether acting separately or together by common or different means, all leading to the same unlawful result. If it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same so as to complete it, with a view to the attainment of that same object the trier of the fact is justified in the conclusion that such persons were engaged in a conspiracy.”

In the first place, the definition ignores the all-important fact that the object of the defendants must be an unlawful object—and under the plain terms of the Conspiracy Statute, that object must be either to commit a crime against the United States or to defraud the United States (U.S.C.A. Title 18, Section 371).

Indeed, it is the pronouncement of a legal platitude to say that any crime may be proven by circumstantial evidence, provided, of course, that it convinces the jury of the guilt of the defendant to a moral certainty and beyond all reasonable doubt, and, further, that all of the circumstances must be consistent with each other and with the guilt of the defendant, and inconsistent with his innocence; otherwise the accused is entitled to an acquittal.

But that is quite a different thing from saying that a conspiracy may be established by hearsay or incompetent evidence. It is always necessary that the act or declaration of a co-conspirator with which the defendant is sought to be charged must be in furtherance of the alleged object of the conspiracy. Thus

mere narrative or anticipatory declarations of co-conspirators as to the acts which they have done or which they intend to do, are incompetent (See *Spies v. People* [the anarchists' case], 122 Ill. 1, 3 Am. St. Rep. 320, 12 NE 865, 17 NE 898).

“In a case where so wide a range of evidence is permissible, a court should carefully guard against the admission of hearsay evidence.”

People v. Larue, 62 Cal. App. 276, 284, 216 Pac. 627.

We particularly direct in this behalf the attention of the Court to the fact that counsel for the Government have not discussed, attempted to distinguish, or even cited, any of the decisions to which we called attention in appellant's opening brief, and in which hearsay of the character of that admitted in the case at bar was held to be reversible error.

THE APPELLANT PROPERLY OBJECTED TO ALL OF THE HEARSAY EVIDENCE, AND PRESERVED HIS OBJECTION BY MOTIONS TO STRIKE THE SAME FROM THE RECORD.

In view of the statement made at page 12 of the brief of appellee that “the Government is in some doubt as to what particular testimony appellant objects,” we draw the attention of the Court to the specifications of errors set forth at page 42 of the opening brief of appellant, in which we state:

“The trial Court erred in admitting, over the objection of appellant, the hearsay testimony of Milton K. Wu as to his dealings and conversations with the alleged co-conspirator, Wee Zee

Yep, all of which were out of the presence of the appellant whom the witness testified that he never saw at any time prior to his arrest. (TR 61.)

“In this behalf we ask to be relieved of the provisions of Subdivisions (d) of Rule 18 of the Rules of the United States Court of Appeals for the Ninth Circuit; which provides:

“ ‘When the error alleged is as to the admission or rejection of evidence the specification shall quote the grounds urged at the trial for objection and the full substance of the evidence admitted or rejected.’

“We make this request for the reason that full compliance with the provisions of the rule would necessitate the reprinting of all of the testimony of the witness following the objections made by appellant’s counsel at page 38 of the transcript. The full substance of this evidence has been heretofore set forth in the abstract of the case, to which we hereby refer, submitting that the restatement of this evidence should be omitted in the interest of brevity.”

Turning to page 38 of the transcript of the record, we find that, at the very commencement of the testimony of the witness Wu, counsel for the appellant objected to any conversation between the witness and the co-defendant Yep. The United States Attorney then stated:

“It is understood that you have objection to the whole series of transactions.”

Counsel for appellant replied:

“That is right, so I will not interrupt.”

The Court: “The objection is over-ruled.”

It thus appears that it was stipulated by counsel that all of the conversations between the witness and Yep came in subject to objection. We find, however, as we set forth in appellant's opening brief, that counsel for appellant repeatedly renewed these objections. See appellant's opening brief, pp. 8, 10, 14, 17, 21, 25 and 28.

Again at TR 154 (appellant's opening brief p. 36) counsel stated:

“Mr. Riordan. If it please the Court, at this time I would move to strike or exclude the evidence upon the grounds that the Court overruled my objection as to the incompetency, irrelevancy, and immateriality of the evidence that was produced on this stand as to Johnny Ong, and also as to all hearsay statements that were allowed during the course of this hearing, on the grounds that the same were made outside the presence of defendant Ong; that they were matters that were hearsay, that were allowed into evidence without the establishment of the corpus delicti of the conspiracy, being the agreement, and the fact that whatever hearsay statements are allowed in during the course of this trial were not or could not in any way be construed as matters in furtherance of a conspiracy.

“Now, I will eliminate some of the, perhaps, technical objections that I have. Very briefly now, I am going to object to any statements that were made by the agents, any acts or failure to act in relation to statements made by the agents on the part of Johnny Ong at the time of his arrest, and any statements made by his wife. Obviously, those are complete hearsay, Your Honor. In no

way could they be construed as an admission against Mr. Ong or in any way in furtherance of a conspiracy.

“Now, I am going to pass over some technical objections. I will object to those statements at the time of the arrest and after the arrest, on the grounds that the arrest was made after long surveillance, and obviously, as this sale was at 10:15 the previous evening, there was time, in my opinion, to get a warrant for arrest.

“Another objection I have on that ground is that there was lack or reasonable cause to believe that a felony was being committed or had been committed by Johnny Ong.

“Another objection that I will have, Your Honor, is that a search of the house was made to ascertain, you will recall, as to whether or not there was a telephone in the home of Mr. Ong. I object to any search of Mr. Ong’s home, on the ground that no warrant for the search was obtained, they having had plenty of time to obtain the same.

“I also object, Your Honor, to any statements made by Rocky Yep outside the presence of Johnny Ong after Mr. Ong—rather, after Mr. Yep—had been picked up and was in custody; that obviously, even assuming that there had been a conspiracy, it was after the last overt act, and it was at the time of the apprehension and could not, in any way, be construed as a furtherance of a conspiracy.”

We think that it would be difficult to find a case in which the record was better protected than by

learned counsel who appeared for the appellant at the trial.

THE INSUFFICIENCY OF THE EVIDENCE.

The contention of appellant that the evidence was insufficient to justify the judgment of conviction, and that the District Court, therefore, erred in denying the several motions made by counsel for judgments of acquittal, is argued at length, with citation of many authorities, both State and Federal, in appellant's opening brief, pp. 47-54. In addition to the decisions there cited, we call attention to the case of *Boyd v. Superior Court*, 113 Cal. App. 2d 443, 248 Pac. 2d 106, in which the District Court of Appeal of the State of California for the Third District issued a peremptory writ of prohibition to the Superior Court to prohibit the trial of the petitioner who had been held to answer by a magistrate for some four different crimes, including robbery. It is stated that the evidence taken at the preliminary examination, while disclosing an association between the accused and the admitted robbers, and his participations with them in other crimes of like character, failed to connect him with the particular crime, his possession and disposition of the clothing of one robber a few hours after the robbery indicating guilty knowledge, but not participation, and his refusal to answer questions concerning his itinerary not being pertinent where those questions were not accusatory in the sense of accusing him of participation in the crime. It will be noted that the evidence in the case just cited was much stronger than in the

case at bar, but the California Court held it insufficient to even justify holding the accused to answer.

Commending at page 52 of appellant's opening brief, we have summarized all of the evidence, other than the hearsay and, we believe, have demonstrated that it is entirely insufficient to warrant a conviction.

THE AGENT PROVOCATEUR.

To what we said on this subject in the opening brief of appellant, we desire to quote the eloquent language of Presiding Justice Shinn of Division 3 of the District Court of Appeal of the State of California for the Second Appellate District in *People v. Braddock*, 118 A.C.A. 957, 961, 258 Pac. 2d 1043:

“The agent provocateur, so despised that he is given no name in our language, and can claim no place in our society, had best have the door shut against him whenever he appears. Our courts have given no encouragement to his hateful practices, no foothold in our field of law enforcement from which to extend his contaminating influence.”

It matters not that the Supreme Court of California subsequently granted a hearing in the *Braddock* case and affirmed the judgment of the Court below. The learned Presiding Justice of the Court of Appeal followed the language of the great Justices, such as the late Justice Brandeis, whose dissenting opinion in *Casey v. United States*, 276 U.S. 413, 48 S. Ct. 373, 74 L. Ed. 632, in which he says that the Court will not

suffer “a detective made criminal to be punished” has been cited with approval by Chief Justice Hughes in *Sorells v. United States*, 287 U.S. 435, 55 S. Ct. 210, 77 L. Ed. 413, in which the rule is reiterated, with the citation of many earlier authorities.

We likewise submit that it is the sheerest absurdity for the Government to state that one who pleads the defense of the agent provocateur admits his guilt. He obviously is not compelled to plead confession and avoidance. He may deny his guilt but also say that if the evidence produced by the officer who solicited the commission of the crime is to be taken as true, he is nevertheless entitled to a verdict of not guilty. The fact that the so-called “defense of entrapment” was not raised at the trial is likewise immaterial. In *Casey v. United States*, supra, the defense was not raised until the filing of the reply brief and the argument of the cause in this Court.

For the reasons set forth in the dissent of Justice Brandeis, which is now regarded as the law, it matters not that the point was not raised, because the Court will stop the prosecution “in order to protect the Government. To protect it from illegal conduct of its officers. To preserve the purity of its courts.”

**THE PREJUDICIAL ERROR OF THE ADMISSION IN EVIDENCE
OF ACCUSATORY STATEMENTS MADE IN THE PRESENCE
OF APPELLANT.**

This matter is fully briefed in appellant’s opening brief, p. 58 et seq. Whatever may be the rule in Cali-

ifornia or in some other jurisdictions, it is the settled rule in the Federal Courts that "when one is under arrest or in custody charged with crime, he is under no duty to make any statement concerning the crime with which he stands charged; and statements tending to implicate him, made in his presence and hearing by others when he is under arrest or in custody, *although not denied by him*, are not admissible against him.

Yep v. United States, 83 Fed. 2d 41;

McCarthy v. United States, 25 Fed. 2d 298.

There is nothing either in *Gentili v. United States*, 22 Fed. 2d 67 or *Rocchia v. United States*, 78 Fed. 2d 966, which is at all inconsistent with this rule.

CONCLUSION.

It is respectfully submitted that the judgment of the District Court should be reversed and the cause remanded with directions to enter a judgment of acquittal.

Dated, San Francisco, California,
January 18, 1957.

Respectfully submitted,

HERRON & WINN,

By FRED R. WINN,

Attorneys for Appellant.



No. 15186

United States
Court of Appeals
for the Ninth Circuit

JENNIE R. DUFF and ELIZABETH BRON-
SON, Appellants,
vs.
H. L. PAGE, Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Nevada

FILED

APR 10 1957

PAUL P. O'BRIEN, CLERK

No. 15186

United States
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Transcript of Record

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* Page numbers appearing at foot of page of original Transcript of Record.



In the District Court of the United States, in and
for the District of Nevada, Northern Division

No. 1217

JOHN A. DUFF, JENNIE R. DUFF, his wife,
and ELIZABETH BRONSON, Plaintiffs,

vs.

H. L. PAGE, Defendant.

COMPLAINT FOR DAMAGES

First Cause of Action

Comes now the plaintiff, John A. Duff, and for
cause of action against the defendant alleges:

I.

That at all times herein mentioned, the plaintiffs,
John A. Duff and Jennie R. Duff, his wife, were
and still are citizens of the State of Idaho; that at
all times herein mentioned, the plaintiff, Elizabeth
Bronson, was and still is a citizen of the State of
California; that at all times herein mentioned, the
defendant was and still is a citizen of the County of
Elko, State of Nevada.

II.

That at all times herein mentioned that certain
highway known as U. S. 40 approximately fourteen
miles west of the City of Wells, County of Elko,
State of Nevada, was and still is a public highway
situated in the County of Elko, State of Nevada,
and at [2] said point, said highway runs approxi-
mately East and West.

III.

That on December 31, 1954, at about 10:00 a.m., plaintiff, John A. Duff, was driving, and plaintiffs Jennie R. Duff and Elizabeth Bronson were riding in, a certain 1955 De Soto Sedan Automobile in a westerly direction on said U. S. Highway 40, approximately fourteen miles west of the City of Wells, County of Elko, State of Nevada; that at the said time and place, the defendant, H. L. Page, so negligently operated, controlled, maintained and parked without any flares, flagman or other warning, his 1941 Studebaker wrecker truck on the northerly improved portion of the said U. S. Highway 40, so as to proximately cause the said 1955 De Soto Sedan Automobile to forcibly strike and collide with the said 1941 Studebaker wrecker truck.

IV.

That as a proximate result of the negligence, as aforesaid, of defendant, the plaintiff, John A. Duff, was severely injured about his body, limbs and head and received a concussion, abrasions about his head, contusion of his left thigh, fracture of the third, fourth and fifth ribs on the left side of his chest with subcutaneous emphysema, and shock to his nervous system, severe pain and suffering, all to his general damages in the sum of Five Thousand and No/100 Dollars (\$5,000.00). That said damages are permanent in character.

V.

That as a proximate result of the negligence, as

aforesaid, of the defendant, the plaintiff, John A. Duff, incurred the following special damages for the purposes indicated after each item, to wit:

Expense and Purpose	Amount
Loss of earnings to date	\$1,360.00
Elko Clinic, medical treatment	80.00
Elko County General Hospital, hospital treatment	215.60
Ambulance to hospital from scene of accident	
One pair of glasses	46.00
(Also future medical care and attention and loss of earnings to be inserted later.)	
Total	<hr/> \$1,701.60

VI.

That as a proximate result of the negligence, as aforesaid, of the defendant, the said 1955 De Soto Sedan, owned by this plaintiff, was damaged in the sum of Three Thousand One Hundred Fifty-one and 70/100 Dollars (\$3,151.70).

VII.

That the plaintiff, Jennie R. Duff, was severely injured as a proximate result of the negligence, as aforesaid, of the defendant, and by reason thereof, plaintiff, John A. Duff, has lost her consortium and services, all to his damage in the sum of Two Thousand and No/100 Dollars (\$2,000.00).

Wherefore, plaintiff, John A. Duff, prays Judgment against the defendant in the sum of Five

Thousand and No/100 Dollars (\$5,000.00), and special damages in the sum of Four Thousand Eight Hundred Fifty-three and 30/100 Dollars (\$4,853.30), together with his costs of suit incurred herein.

Second Cause of Action

Comes now the plaintiff, Jennie R. Duff, and for cause of action against the defendant, alleges:

I.

The plaintiff hereby refers to Paragraphs I, II and III of the First Cause of Action, and incorporates the same herein as though set forth in full herein.

II.

That as a proximate result of the negligence, as aforesaid, [4] of the defendant, the plaintiff, Jennie R. Duff, was severely injured about her body, limbs and head and received a concussion, fracture of the second, third and fourth ribs on her left side, a compression fracture of the seventh vertebrae, a fracture with depression of the sternum, a laceration of her knee, hemathorax bilateral due to trauma, laceration of the forehead with numerous stitches, severe shock to her nervous system, pain and suffering, all of which injuries are permanent in character, all to her general damages in the sum of Twenty-five Thousand and No/100 Dollars (\$25,000.00).

III.

That as a proximate result of the negligence, as aforesaid, of the defendant, said plaintiff, Jennie

R. Duff, incurred the following special damages for the purposes indicated after each item, to wit:

Expense and Purpose	Amount
Elko Clinic, medical treatment	\$334.50
Elko County General Hospital, hospital treatment	431.95
X-Rays	15.00
	<hr/>
Total	\$781.45

IV.

Plaintiff will need further medical care, drugs, medicine and attention, and when she ascertains the amounts thereof, she prays that she be allowed to insert the same herein.

Wherefore, Plaintiff, Jennie R. Duff, prays Judgment against the defendant in the sum of Twenty-five and No/100 Dollars (\$25,000.00), and special damages in the sum of Seven Hundred Eighty-one and 45/100 Dollars (\$781.45), together with her costs incurred herein.

Third Cause of Action

Comes now the plaintiff, Elizabeth Bronson, and for cause [5] of action against the defendant, alleges:

I.

The plaintiff hereby refers to Paragraphs I, II and III of the First Cause of Action and incorporates the same herein as though set forth in full herein.

II.

That as a proximate result of the negligence, as

aforesaid, of the defendant, the plaintiff, Elizabeth Bronson, was severely injured about her body, limbs and head and received a concussion, fracture of the sixth, seventh and eighth ribs on her left side, acromio-clavicular dislocation on the left side, a traumatic hematoma of her face, severe pain, suffering, shock to her nervous system, all of which injuries are permanent in character, all to her general damages in the sum of Twenty-five Thousand and No/100 Dollars (\$25,000.00).

III.

That as a proximate cause of the negligence, as aforesaid, of the defendant, said plaintiff incurred the following special damages for the purposes indicated after each item, to wit:

Expense and Purpose	Amount
Elko Clinic, medical treatment	\$217.00
Elko County General Hospital, hospital treatment	393.95
Loss of earnings at \$15.00 per week	210.00
Dr. Brockbank, medical care	25.00
Dr. Grover, medical care	10.00
Dr. Lee, medical care	3.00
	<hr/>
Total to date	\$858.95

IV.

That plaintiff is informed and believes that she will need further medical care and attention and will lose further earnings, and when she ascertains

the amounts thereof, she prays that she be allowed to insert the same herein.

Wherefore, plaintiff prays Judgment against defendant in [6] the sum of Twenty-five Thousand and No/100 Dollars (\$25,000.00), and special damages in the sum of Eight Hundred Fifty-eight and 95/100 Dollars (\$858.95), to date and such special damages hereafter suffered, together with her costs of suit incurred.

Dated this 7th day of April, 1955.

WRIGHT & EARDLEY,
/s/ By GEORGE F. WRIGHT,
Attorneys for Plaintiffs.

/s/ By HERMAN E. BEDKE,
Of Counsel.

Demand is hereby made for a jury trial.

WRIGHT & EARDLEY,
/s/ By GEORGE F. WRIGHT,
Attorneys for Plaintiffs. [7]

[Endorsed]: Filed April 8, 1955.

[Title of District Court and Cause.]

ANSWER AND COUNTERCLAIM

Answering plaintiffs' complaint, defendant above named admits, denies and alleges as follows:

Answering the First Claim For Relief of plaintiff, John A. Duff:

First Defense

Defendant admits the allegations contained in

Paragraphs I and II, and denies each and every other allegation contained in the first claim for relief of John A. Duff.

Second Defense

Whatever injuries and damages were sustained by the plaintiff as a result of the accident as alleged in the first claim for relief herein were caused in whole or in part by or were contributed [8] to by reason of the negligence, carelessness, recklessness and misconduct of the plaintiff in that plaintiff was operating his 1955 De Soto automobile in a grossly negligent and reckless manner at the time that same collided with defendant's 1941 Studebaker wrecker truck, that said plaintiff was driving said automobile at an excessive and dangerous rate of speed, that defendant's vehicle was stationary and visibility was good with sunshine weather existing at the time of the accident, that the road was in a good and safe drivable condition; that plaintiff's view was unobstructed for a distance of 2,710 feet from the point of impact, that plaintiff failed to heed the red light blinker signal of the defendant and drove into and struck defendant's vehicle in defiance of said signal, and that this negligence on the part of the plaintiff contributed to and proximately caused the alleged injuries and damages to the plaintiff.

Third Defense

That at the time and place of said accident as alleged in the first claim for relief, the plaintiff, John A. Duff, then and there saw, or by the exercise of

reasonable care could have seen, defendant in a position of imminent peril in time, by the exercise of ordinary care without injury to himself or others, to have slackened the speed of said automobile or stopped it or turned it aside and avoided collision with defendant and the consequent injury, but the plaintiff failed so to do, and failed to take any care or caution to avoid or prevent collision with defendant after having the last clear chance so to do.

Fourth Defense

Whatever injuries and damages were sustained by plaintiff as alleged in the first claim for relief were a result of a course of circumstances beyond the control of the defendant, and were unavoidable so far as defendant was concerned. [9]

Answering the Second Claim For Relief of plaintiff, Jennie R. Duff:

First Defense

Defendant admits, denies and alleges in answer to Paragraph I of the second claim for relief in the same manner as herein answered in answer to Paragraphs I, II and III of the first claim for relief and incorporates said answers as though set forth in haec verba; and denies each and every other allegation contained in the second claim for relief.

Second Defense

Whatever injuries and damages were sustained by plaintiff, Jennie R. Duff, as the result of the accident as alleged in the complaint herein, were caused in whole or in part or were contributed to

by the negligence of plaintiff in that she continued to allow her husband, John A. Duff, to drive at an excessive rate of speed when she had notice and knowledge of her husband's impaired vision, advanced age, driving habits, and that he had been driving in such a manner and for such a period of time that she should have realized he could not conduct himself as a reasonable and prudent person should, and that by virtue thereof the said plaintiff, Jennie R. Duff, was negligent in such a manner as to be the cause of or contribute to any injuries she may have suffered; that said plaintiff could have avoided any and all damages she may have sustained had she exercised reasonable care of her own person by insisting that her husband not drive at all or at least refrain from driving at an excessive rate of speed and in a careless and reckless manner in view of the circumstance then obtaining.

Third Defense

Whatever injuries and damages were suffered by the plaintiff, Jennie R. Duff, as a result of the accident as alleged in the complaint were not suffered as a result of the negligence of defendant, H. L. Page, but were caused wholly by the negligence of her [10] husband, John A. Duff, a third person over whom defendant had no control or supervision and for whose acts defendant was not responsible, or partly by the negligence of the coplaintiff husband and the contributory negligence of the plaintiff, and said negligence on the part of the coplaintiff driver was the sole proximate cause of the in-

jury, without any negligence on the part of the defendant.

Fourth Defense

If defendant were negligent in any manner or means as alleged in the complaint, said alleged negligence was not the proximate cause of plaintiff's injuries and damages, but said alleged injuries and damages were proximately caused by the negligence of her husband, John A. Duff, or partly by the negligence of said coplaintiff with the contributory negligence of plaintiff.

Fifth Defense

That at the time and place of said accident, plaintiff, John A. Duff, her husband, then and there saw, or by the exercise of reasonable care could have seen, the position of immediate peril of the defendant and by the exercise of reasonable care and prudence the said coplaintiff husband had the last clear chance of avoiding said accident so that the proximate cause of any damages or injuries sustained by plaintiff wife, Jennie R. Duff, was the result of the inattentiveness of her husband to discover the known danger and said damages or injuries were not proximately caused by any negligence on the part of the defendant.

Sixth Defense

Whatever injuries and damages were sustained by plaintiff, Jennie R. Duff, as alleged in the second claim for relief, were a result of a course of circumstances beyond the control of the defendant, and were unavoidable so far as defendant was concerned.

Answering the Third Claim for Relief of plaintiff, Elizabeth Bronson: [11]

First Defense

Defendant admits, denies and alleges in answer to Paragraph I of the third claim for relief in the same manner as herein answered in answer to Paragraphs I, II and III of the first claim for relief and incorporates said answers as though set forth in haec verba; and denies each and every other allegation contained in the third claim for relief.

Second Defense

Whatever injuries and damages were sustained by plaintiff, Elizabeth Bronson, as a result of the accident as alleged in the complaint herein, were caused in whole or in part or were contributed to by the negligence of plaintiff in that she continued to allow the driver, John A. Duff, to drive at an excessive rate of speed when she had notice and knowledge of the driver's impaired vision, advanced age, driving habits, and that he had been driving in such a manner and for such a period of time that she should have realized he could not conduct himself as a reasonable and prudent person should, and that by virtue thereof the said plaintiff, Elizabeth Bronson, was negligent in such a manner as to be the cause of or contribute to any injuries she may have suffered; that said plaintiff could have avoided any and all damages she may have sustained had she exercised reasonable care of her own person by insisting that the driver not drive at all or at least refrain from driving at an excessive rate of speed

and in a careless and reckless manner in view of the circumstance then obtaining.

Third Defense

Whatever injuries and damages were suffered by the plaintiff, Elizabeth Bronson, as a result of the accident as alleged in the complaint were not suffered as a result of the negligence of defendant, H. L. Page, but were caused wholly by the negligence of the driver, John A. Duff, a third person over whom defendant had no control or supervision and for whose acts defendant was not [12] responsible, or partly by the negligence of the complaintiff husband and the contributory negligence of the plaintiff, and said negligence on the part of the complaintiff driver was the sole proximate cause of the injury, without any negligence on the part of the defendant.

Fourth Defense

If defendant were negligent in any manner or means as alleged in the complaint, said alleged negligence was not the proximate cause of plaintiff's injuries and damages, but said alleged injuries and damages were proximately caused by the negligence of the driver, John A. Duff, or partly by the negligence of said complaintiff with the contributory negligence of plaintiff.

Fifth Defense

That at the time and place of said accident, plaintiff, John A. Duff, the driver, then and there saw, or by the exercise of reasonable care could have seen, the position of immediate peril of the defend-

ant and by the exercise of reasonable care and prudence the said coplaintiff driver had the last clear chance of avoiding said accident so that the proximate cause of any damages or injuries sustained by plaintiff guest, Elizabeth Bronson, was the result of the inattentiveness of the driver to discover the known danger and said damages or injuries were not proximately caused by any negligence on the part of the defendant.

Sixth Defense

Whatever injuries and damages were sustained by plaintiff, Elizabeth Bronson, as alleged in the third claim for relief, were a result of a course of circumstances beyond the control of the defendant, and were unavoidable so far as defendant was concerned.

Counterclaim

Comes now, H. L. Page, defendant above named, and by way of counterclaim against plaintiff, John A. Duff, alleges as follows:

I.

Defendant is a citizen of the State of Nevada and plaintiff [13] is a citizen of the State of Idaho. The amount in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars.

II.

On the 31st day of December, 1954, defendant, as owner and operator of the Page Garage at Wells, Nevada, was called upon to assist in extricating an automobile and trailer owned and operated by one Glen R. Shaw from a snowbank on the north side

of a public highway, called United States Highway number 40, at a point approximately fourteen miles west of Wells, Nevada. In performing said task, defendant had placed his 1941 Studebaker wrecker truck at about a twenty degree angle across the westbound lane of traffic, with the left wheel of said vehicle off the paved surface of said highway and the right wheel on the very edge of said paved surface, thus placing the rear end of the wrecker within approximately eighteen inches of the overturned trailer, leaving at least twenty feet of travelable road surface between the front of the wrecker and the nearest obstruction on the south edge of said highway. That at all times the defendant and his assistant, Clifford N. Eldon, were performing their functions in a safe, prudent and reasonable manner in that the red blinker light on the truck was in operation, they had personally flagged numerous automobiles traveling in either direction past the scene of the operations, and were performing said operations in the only possible and reasonable manner in the ordinary and usual course of extricating and towing damaged vehicles. That at the time the weather was clear with only a slight overcast and visibility was good along a straight stretch of the said highway to the east for a distance of approximately 2,710 feet. The said highway was wet and slushy but in a safe drivable condition for those traveling at a moderate rate of speed. [14]

III.

That at said time and said place, at about 10

o'clock a.m., a certain 1955 DeSoto Sedan automobile driven by the said plaintiff, John A. Duff, came down said highway at a reckless and highly dangerous rate of speed, in excess of seventy miles per hour, in view of the circumstances and the then existing highway conditions, traveling in a westerly direction down the right side of said highway. That the said plaintiff drove the entire 2,710 feet from the top of the knoll to the scene of the accident at said reckless and excessive rate of speed, without materially slackening the speed at which said automobile was traveling, in a straight path down said northern side of the highway to a point approximately six feet away from the location where defendant's wrecker was parked, at which point the said plaintiff turned his automobile sharply to the right and struck and collided with the left side of said wrecker behind the cab knocking said wrecker sixty-two feet in a southwest direction. That the brakes on said wrecked had been set with two thousand pounds pressure and the red warning light was still in operation after the accident. That shortly before said collision, the defendant had been directing traffic and had looked east and no cars were in sight. That defendant had returned to the tow truck and had stepped on the running board on the west side to get a tool from the tool compartment. That plaintiff, John A. Duff, drove upon the scene at such a negligent, reckless and excessive rate of speed that it was impossible to anticipate his approach and defendant could not have avoided being struck by plaintiff no matter what position

his wrecker truck had been placed. That by reason and virtue of plaintiff driving against and striking said tow truck, the defendant was violently thrown approximately twenty feet southwest from the point he was standing and thereby sustained serious injuries to both his person and property. [15]

IV.

That the manner of operation of such automobile by plaintiff, John A. Duff, at the time and place aforesaid, under the circumstances then and there existing, was unlawful, reckless and highly dangerous to the life and limb of defendant and others then and there traveling on said highway, and said plaintiff was grossly negligent in driving at an excessive rate of speed so as to strike an obvious obstacle which should have been seen by plaintiff for as far as a mile away, and which was an obvious danger which plaintiff had, or should have, observed so as to give him the last clear chance of avoiding said collision had he not been operating said automobile in an incompetent, inexperienced, grossly negligent and reckless manner in view of the conditions then existing.

V.

As a direct and proximate result of the collision and striking of said wrecker truck by the plaintiff as alleged, defendant, H. L. Page, was greatly wounded and bruised in and about his head, face and body, suffering abrasions, contusions and an acute hernia to his right side, which will require surgery in the near future by the recommendation

of doctors, and because and by reason of such injuries, defendant suffered a great nervous shock, became sick, sore, lame and disordered and has so remained, and continued and still does so remain and continue up to the present time, during which time said defendant has suffered and does suffer great bodily pain and mental distress, all to his general damage in the sum of Seven Thousand Five Hundred Dollars (\$7,500.00), and defendant alleges that the injuries he has sustained will be permanent.

VI.

That as a direct and proximate result of the collision and striking of said wrecker truck by the plaintiff, the defendant, H. L. Page, has had to pay out and become liable for sums of money [16] to repair his wrecker truck and for medical expenses in the following amounts:

Repair of wrecker truck	\$1,140.75
Loss of profit & use of trucker for calls	1,350.00
Medical expenses	28.35
Traveling expenses for medical treat- ments	75.00
Total	<hr/> \$2,594.10

And, defendant will be compelled to spend further sums for medical, hospital and nurses' expenses for a time not now determinable and in amounts not now ascertainable which defendant prays that he be allowed to insert herein at a future time.

Wherefore, defendant prays and demands judgment against plaintiff under this Counterclaim in a general amount of \$7,500.00 and special damages in the sum of \$2,594.10, together with costs and disbursements incurred herein.

Dated: This 2nd day of May, 1955.

PIKE & McLAUGHLIN,
Attorneys for Defendant,
/s/ By JOHN S. McLAUGHLIN,
For the Firm.

Certificate of Mailing attached. [17]

[Endorsed]: Filed May 3, 1955.

[Title of District Court and Cause.]

REPLY TO COUNTERCLAIM

Plaintiff John A. Duff replies to the counterclaim of the defendant as follows:

I.

Admits Paragraph I of said counterclaim.

II.

Denies each and every, all and singular, of the allegations of Paragraph II, save and except that plaintiff admits the following: Lines 5 to 10, ending with the word "Nevada."

III.

Denies each and every, all and singular, of the allegations of Paragraph III, save and except, that the plaintiff admits the following: Admits that the

plaintiff at said time and place was driving a 1955 DeSoto sedan automobile.

IV.

Denies each and every, all and singular, of the allegations of Paragraph IV.

V.

Plaintiff is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs [18] V and VI of said counterclaim.

First Affirmative Defense

For a first affirmative defense plaintiff alleges as follows:

I.

That on December 31, 1954, at about the hour of 10:00 a.m., the defendant, H. L. Page, so negligently operated, controlled, maintained and parked his 1941 Studebaker wrecker truck, at a point approximately 14 miles west of Wells, County of Elko, State of Nevada, on U. S. Highway 40, a public highway, and in the west bound traffic lane, all without any flares, flagman or other warning, so as so proximately cause a certain 1955 DeSoto sedan automobile driven by the plaintiff at said time and place to strike and collide with the said 1941 Studebaker wrecker truck; that the damages, if any, to the said wrecker truck, and the injuries, if any, sustained by the defendant, H. L. Page, were approximately caused by or contributed to by the negligence, as aforesaid, of the said defendant.

Wherefore, plaintiff, John A. Duff, prays for

damages and costs in accordance with his complaint, and that the defendant, H. L. Page, take nothing by reason of his counterclaim.

Dated this 19th day of May, 1955.

WRIGHT & EARDLEY,
HERMAN BEDKE,
Of Counsel.

GOLDWATER, TABER AND
HILL,

/s/ By HAROLD O. TABER,
Attorneys for Plaintiff. [19]

Acknowledgment of Receipt of Copy Attached. [20]

[Endorsed]: Filed May 20, 1955.

[Title of District Court and Cause.]

PRETRIAL ORDER

The above matter came on this 13th day of June, 1955, at the hour of 4:00 o'clock P.M. for pretrial, George Wright, Esq., appearing for all of the plaintiffs, Harold O. Taber, Esq., appearing for the plaintiff John A. Duff, and Miles N. Pike, Esq., and John W. Barrett, Esq., appearing for the defendant.

Jurisdiction

The Court has jurisdiction of this matter on the basis of diversity of citizenship, and the amount sued for exclusive of interest being in excess of \$3,000.00.

Nature of the Case

This is an action based on negligence brought by plaintiffs against the defendant arising out of injuries alleged to have been suffered to plaintiffs by reason of a collision between the automobile owned and operated by the plaintiff, John A. Duff, and an auto wrecker owned by the defendant. Defendant counterclaims for his alleged injuries.

Agreed Facts

At about the hour of 10:00 o'clock A.M., on the 31st day of December, 1954, defendant in the process of removing [23] an automobile and trailer from a snow bank off the north side of Highway 40, at a point approximately fourteen (14) miles west of Wells, Nevada, had his 1941 Studebaker wrecker parked in the north traffic lane of said highway, that being the traffic lane for traffic normally moving west. That the plaintiffs were proceeding west in a 1955 De Soto automobile owned and driven by plaintiff John A. Duff. Plaintiff Jennie R. Duff was the wife of John, and the plaintiff Elizabeth Bronson was a friend accompanying them on the journey. All three plaintiffs were riding in the front seat. There was a straight approach of highway of approximately 0.40 miles from the east, with a slight down grade, toward the parked wrecker; the road was oil surfaced and approximately forty-three (43) wide with a broken white painted center line including about $7\frac{1}{2}$ feet of mixed oil and gravel shoulder on the north side and 8 feet of shoulder on the south side. (See "Stipulations") The day was clear with good visibility.

Plaintiffs' Contentions

Plaintiffs contend that there was snow and slush on the road surface; that there were no proper warnings, signals or markers on or in the immediate vicinity of the parked wrecker; that the wrecker was approximately 17 feet in length and parked almost straight across the west bound traffic lane, with its front end almost to the white center line on the highway, its rear end extending to the beginning of the oil and gravel north shoulder; that plaintiff was driving with due care and applies his brakes at sufficient distance from the wrecker to have stopped under ordinary circumstances but that the snow and slush on the highway caused his car to skid several hundred feet causing it to collide with the wrecker; that the wrecker was parked [24] on the highway illegally and contrary to Section 4365, N.C.L., 1929.

Defendant's Contentions

Defendant contends that he was lawfully parked on the highway and pursuing the business for which he had been summoned, namely, the removal of a car and trailer from a snow bank on the north side of the highway; that a red blinker warning light was mounted on the wrecker and was in full operation; that plaintiffs as they approached had a clear unobstructed view down the highway to the west toward the wrecker of approximately 0.40 of a mile; that the road was wet but presented a safe driving surface; that plaintiff, John A. Duff, was driving the DeSoto in a grossly negligent and reckless man-

ner and at an excessive and dangerous rate of speed; that the collision was due entirely to the negligence of the plaintiffs and that there was no contributory negligence on his part; that the negligence of the plaintiffs was the sole proximate cause of the injuries received by them as a result of the collision.

The Pleadings

(a) The Complaint.

Plaintiffs' complaint makes out three causes of action against defendant for damages resulting from injuries received as a result of the collision based on defendant's negligence, predicated on (1) general negligence, and (2) unlawful parking on the highway. John A. Duff asks for special damages in the amount of \$4,853.30 and general damages in the amount of \$5,000.00; Jennie R. Duff seeks special damages amounting to \$781.45 and general damages amounting to \$25,000.00; the prayer of Elizabeth Bronson is for \$858.95 special damages and \$25,000.00 general damages. All three plaintiffs pray for costs. [25]

(b) The Answer.

Defendant as to each cause of action denies his (1) negligence, and (2) will contend that he was lawfully on the highway. As separate defenses he asserts as to plaintiff, John A. Duff:

2. Contributory negligence on the part of Duff, and that such contributory negligence was the proximate cause of the injuries claimed and damages suffered.

3. That the plaintiff, John A. Duff, saw, or by the exercise of reasonable diligence could have seen, that the defendant was in a position of imminent peril.

4. Unavoidable accident.

As to Jennie R. Duff:

1. General denial of negligence.

2. Contributory negligence on her part.

3. That sole negligence of John A. Duff was proximate cause of collision and injuries, or the concurrent negligence of Duff plus Jennie's contributory negligence, was the sole proximate cause of the collision and injuries.

4. That if defendant was negligent his negligence was not the proximate cause of collision and injuries, but that same was caused by the sole negligence of Duff, or concurring negligence of Duff and contributory negligence on part of Jennie.

5. That her injuries were due to her husband's failure to observe the last clear chance rule.

6. That the accident was unavoidable.

As to Elizabeth Bronson:

The same defenses are made to the Bronson cause of action as to Jennie Duff's cause of action.

(c) Counterclaim.

Defendant, by way of counterclaim against John A. Duff, asserts damages occasioned by the negligence of Duff in the operation of the DeSoto, both to himself and to the wrecker [26] truck, said negligence being based upon (1) Duff driving at an excessive rate of speed, and his (2) failure to observe

the last clear chance rule. Special damages in the amount of \$2,594.10 and general damages in the amount of \$7,500.00 are prayed for. Defendant prays for costs.

(d) Reply to Counterclaim.

By his reply to the counterclaim, John A. Duff, asserts:

1. General denial of negligence.
2. Contributory negligence on part of Duff.

Issues of Law

The issues of law involved in the claims and defenses here presented are: (1) negligence, (2) contributory negligence, (3) last clear chance.

Stipulations

1. It is stipulated that the corrected testimony of the witness Springmeyer, whose deposition has been taken, will be received as to measurements and character of highway and shoulders at point of collision.

2. It is conceded that defendant's defense of last clear chance against John A. Duff has no merit as against Jennie R. Duff and Elizabeth Bronson.

3. The map heretofore prepared by Springmeyer will be received in evidence without foundation, and the conditions thereon depicted are accepted as true.

4. That the depositions of any of the witnesses heretofore taken may be received in evidence.

5. That medical examinations will be taken by the parties of plaintiffs and defendant, and that

such reports will be exchanged between respective counsel.

6. That the following items of special damages were incurred by the respective parties as a result of the collision and are reasonable: [27]

John A. Duff:

Elko Clinic	\$ 80.00
Elko General Hospital.....	215.60
One pair of glasses.....	46.00
<hr/>	
Total	\$ 341.00

Jennie R. Duff:

Elko Clinic	\$ 334.50
Elko General Hospital.....	431.05
<hr/>	
Total	\$ 765.55

Elizabeth Bronson

Elko Clinic	\$ 217.00
Elko General Hospital.....	393.95
H. B. Grover, M.D.	
Vallejo	10.00
Dr. Lee, Vallejo.....	3.00
Dr. Brockbank	25.00
<hr/>	
Total	\$ 648.95

7. It is stipulated that there will be additional items of special damages, and as to these upon the production of receipted statements they will be deemed included with the foregoing particularized items.

8. It is also stipulated that counsel will agree upon the items of special damage incurred and to be incurred by the defendant, Page.

Trial Date

It is indicated that each of the parties will have about six witnesses, in addition to medical testimony of doctors if such testimony be required. No expert witnesses will be offered other than medical. It is estimated that it will take three days to try the case before a jury, and November 7, 8 and 9, 1955, has been fixed for trial.

Order

Pursuant to discussion and stipulation of counsel and on the basis of the pleadings and the foregoing comment, it is Ordered as follows:

1. That the foregoing constitutes the pretrial order [28] in this matter, subject to the right of respective counsel to suggest within ten days from this date any necessary or appropriate changes so as to conform to the pretrial discussion. None Being Offered the Order Will Stand As Final, and in Lieu of the Pleadings. Copies of any proposed changes must be served on counsel for the opposite party who shall have five days from receipt thereof to make and file his consent, or opposition, to such proposed changes, and/or to offer such amendments as deemed proper. It is suggested that counsel confer and agree on changes, reporting to the Court as follows: (1) Changes agreed on; (2) plaintiffs' changes not agreed to by defendant; and (3) defendant's changes not agreed to by plaintiffs.

2. That each of the stipulations above set-out are approved and made a part of this order by reference.

3. That this matter be set for trial before a jury on November 7, 8 and 9, 1955.

Dated at Carson City, Nevada, this 13th day of June, 1955.

/s/ JOHN R. ROSS

United States District Judge. [29]

[Endorsed]: Filed June 16, 1955.

[Title of District Court and Cause.]

OBJECTIONS TO PRE-TRIAL ORDER

Come Now the plaintiffs and cross-defendant, John A. Duff, and make the following objections to the Pre-Trial Order of the above-entitled Court, filed in the above action on June 16, 1955:

Agreed Facts

The plaintiffs and said cross-defendant accept the said Agreed Facts, save and except on line 12, page 2, the words "slight down grade" are hereby objected to in that the word "slight" should be omitted. The exact grade, according to the map of W. H. Settlemyer, and the enclosed Certificate of W. H. Settlemyer, is a 3.34% grade from the point of the accident and eastward. Therefore, the word "slight" should be omitted.

Plaintiffs' Contentions

The plaintiffs' contentions are correctly shown,

save and except that in line 20 and line 30, page 2, the word "slush" should be changed to the word ice. Also, in line 28, page 2, the word "applies" should be changed to applied. [30]

Stipulations

Under Paragraph I, page 5, the word "Springmeyer" should be changed to Settlemyer.

Dated this 21st day of June, 1955.

HERMAN BEDKE,

Of Counsel.

GOLDWATER, TABER and HILL,
WRIGHT & EARDLEY,

/s/ By GEORGE F. WRIGHT,

Attorneys for Plaintiff and Cross-Defendant, John
A. Duff.

To Whom It May Concern:

This Is To Certify that the grade on U.S. Highway 40, approximately 14 miles west of Wells, Nevada, between Highway Station 248/73 (point where the piece of chrome is shown on the Settlemyer map) to the east on said highway to Highway Station 269/00, was measured by the undersigned, W. H. Settlemyer, on January 7, 1955, and the said grade was a 3.34% up-grade proceeding from a westerly direction to an easterly direction. That the grade between these two Highway Stations was a uniform grade. A 3.34% grade means that there is a rise of 3.34 feet in each 100 feet of distance.

Dated: June 23rd, 1955.

/s/ W. H. SETTLEMEYER,
Surveyor, County of Elko, State of Nevada, [32]
Certificate of Mailing Attached. [31]

[Endorsed]: Filed June 24, 1955.

[Title of District Court and Cause.]

DEFENDANT'S PROPOSED CHANGES IN
PRETRIAL ORDER FILED JUNE 16, 1955

Defendants refers to the Pretrial Order filed by the Court on June 16, 1955, and suggests the following as an appropriate change to conform to the Pretrial discussion:

At Page 5, Lines 19 to 21, under the heading, "Stipulations", the Order states, "It is conceded that defendant's defense of last clear chance against John A. Duff has no merit as against Jennie R. Duff and Elizabeth Bronson." A review of the law as applied to plaintiffs' contentions relating to the particular facts under which the collision of these two vehicles occurred is such that we do not consider that at this time defendant should make such a concession, and for that reason defendant objects to that language in the Pretrial Order.

It is stipulated with counsel for plaintiffs that on Page 5, Paragraph 1, Line 16, the word "Settle-meyer" should be substituted for the word "Spring-meyer", and also that on Page 2, [33] Line 28,

the word, "applied" should be substituted for "applies".

Dated: June 23, 1955.

PIKE & McLAUGHLIN,
Attorneys for Defendant.

/s/ By MILES N. PIKE,
For the Firm. [34]

[Endorsed]: Filed June 25, 1955.

[Title of District Court and Cause.]

NOTICE AND MOTION TO AMEND
PRE-TRIAL ORDER

To the Above-Named Defendant and His Attorneys,
Pike & McLaughlin, and to the Above-Entitled
Court:

You, and Each Of You, will please take notice that on November 7, 1955, at the hour of 10:00 o'clock A.M., the plaintiffs will move the above-entitled Court to amend the Pre-trial Order of the above-entitled Court, which is dated June 13, 1955, as herein set forth in the said Motion; said Motion will be made and based upon the ground of the inadvertence, mistake and excusable neglect of plaintiffs' counsel.

Motion

Comes Now the plaintiffs above-named and move the above-entitled Court to amend said PreTrial Order, dated June 13, 1955, on Page 2, line 10, as to the following words thereof: "All three plaintiffs were riding in the front seat."

That in place thereof, the plaintiffs hereby move the above-entitled Court to insert the following: "That the plaintiff, John A. Duff, was driving said 1955 DeSoto automobile, the [43] plaintiff, Elizabeth Bronson, was seated on the right front seat, and the plaintiff, Jennie R. Duff, was in the back seat."

Said Motion will be made and based upon the Affidavit attached hereto.

Dated: November 1, 1955.

HERMAN E. BEDKE,
GOLDWATER, TABER & HILL,
WRIGHT & EARDLEY,

/s/ By GEORGE F. WRIGHT,
Attorneys for Plaintiffs.

Acknowledgment of Receipt of Copy Attached. [44]

AFFIDAVIT IN SUPPORT OF MOTION TO
AMEND PRE-TRIAL ORDER

State of Nevada,
County of Elko—ss.

George F. Wright, being first duly sworn, deposes and says:

That he is, and at all times herein-mentioned was, a duly licensed and practicing attorney in all of the Courts in the State of Nevada and in the District Courts of the United States, in and for the State of Nevada; that he, at all times herein-men-

tioned, was, and still is, in active charge of the above action on behalf of plaintiffs;

That affiant received the original Pre-Trial Order and went over the same and made certain requests for changes. That in going over the same, affiant failed to notice that the Pre-Trial Order provided that all three plaintiffs were riding in the front seat.

That there has been testimony in the Justice of the Peace [45] Court at Wells, Nevada, in the District Court at Elko, Nevada, and the depositions taken of all three plaintiffs. The testimony of all witnesses has been consistent at all times that Mr. Duff was driving, Mrs. Bronson was in the front seat and Jennie R. Duff was in the back seat;

That the defendant was present at the taking of testimony in the Justice of the Peace Court and the District Court, and his attorneys have had copies of the testimony in the District Court at Elko, Nevada, for a considerable length of time, and the depositions of all three plaintiffs were taken on September 19, 1955, by the defendant's attorneys.

/s/ GEORGE F. WRIGHT

Subscribed and sworn to before me this 1st day of November, 1955.

[Seal] /s/ ROSS P. EARDLEY,
Notary Public.

[Endorsed]: Filed November 7, 1955.

[Title of District Court and Cause.]

COPY OF MINUTE ENTRY FOR NOV. 7, 1955

* * * It is ordered that the Motion to Amend Plaintiff's Complaint is granted. It is further ordered, on motion of defendant, that the pre-trial order is amended striking the language objectionable to defendant. It is further ordered that at lines 20 and 30, page 2, of the pre-trial order, same is amended by striking the word "slush" and inserting the word "ice" in lieu thereof. * * * [47]

[Title of District Court and Cause.]

**CERTIFICATE OF PLAINTIFFS' REQUEST
OF QUESTIONS TO BE PROPOUNDED
TO JURORS ON VOIR DIRE**

This Is To Certify that on November 9, 1955, the above matter duly came on for trial before the above Court, sitting with a Jury, the Honorable John R. Ross, Judge, presiding, at Carson City, Nevada.

That on said day and before the trial commenced, George F. Wright, one of the attorneys for the plaintiffs, handed to the said Judge, John R. Ross, a paper designated "Questions Requested by Plaintiffs of Jurors." That one of the questions was as follows: "Do you own any stocks or bonds in the American Casualty Co." The Judge indicated that he would not ask the question proposed.

That in the voir dire examination the Judge did

not ask said question of the prospective jurors, nor did counsel for plaintiffs during said voir dire examination, or at any time at all in the courtroom, suggest that such question be asked; the only reference ever made to such question being in chambers prior to trial as above mentioned.

Dated at Carson City, Nevada, this 23rd day of July, 1956.

/s/ JOHN R. ROSS,

United States District Judge

Attest: A True and Correct Copy.

[Seal] /s/ OLIVER F. PRATT,

Clerk

/s/ By BERNARD SUPEROF,

Deputy.

[Endorsed]: Filed July 23, 1956.

[Title of District Court and Cause.]

VERDICT

We, your Jury in the above entitled matter, find in favor of the defendant, H. L. Page, and against the plaintiff, Elizabeth Bronson.

Dated: November 15, 1955.

/s/ EDWARD S. PARSONS,

Foreman. [48]

[Endorsed]: Filed Nov. 15, 1955.

[Title of District Court and Cause.]

VERDICT

We, your Jury in the above entitled matter, find in favor of the defendant, H. L. Page, and against the plaintiff, Jennie R. Duff.

Dated: November 15, 1955.

/s/ EDWARD S. PARSONS,
Foreman. [49]

[Endorsed]: Filed Nov. 15, 1955.

[Title of District Court and Cause.]

VERDICT

We, your Jury in the above entitled matter, find in favor of the defendant, H. L. Page, and against the plaintiff, John A. Duff.

Dated: November 15, 1955.

/s/ EDWARD S. PARSONS,
Foreman. [50]

[Endorsed]: Filed Nov. 15, 1955.

[Title of District Court and Cause.]

VERDICT

We, your Jury in the above entitled matter, find in favor of the defendant and counterclaimant, H. L. Page, and against the plaintiff, John A. Duff, and fix defendant's and counterclaimant's damages

in the amount of \$6,816.58 against the plaintiff, John A. Duff.

Dated: November 15, 1955.

/s/ EDWARD S. PARSONS,

Foreman. [51]

[Endorsed]: Filed Nov. 15, 1955.

[Title of District Court and Cause.]

JUDGMENT ENTRIES MADE IN THE CIVIL DOCKET

November 16, 1955. Entg. Judgment, Judgment: Judgment is entered in favor of the Defendant H. L. Page and against the plaintiff, Elizabeth Bronson. Entg. Judgment, Judgment: Judgment is entered in favor of the Defendant H. L. Page and against the plaintiff, Jennie R. Duff. Entg. Judgment, Judgment: Judgment is entered in favor of the Defendant H. L. Page and against the plaintiff, John A. Duff. Entg. Judgment, Judgment: Judgment is entered in favor of Defendant and counter-claimant, H. L. Page and against plaintiff, John A. Duff in the amount of \$6,816.58.

Counsel notified of above entry of Judgment.

March 15, 1956. Entg. Judgment. Judgment: It is ordered that plaintiff's motion for judgment notwithstanding the verdict and judgment be, and the same hereby is denied.

Entg. Judgment. Judgment: It is ordered that the Motion of plaintiff and counter-defendant for a new trial be, and the same hereby is, denied.

Counsel notified of the above entries. [52]

In The United States District Court
For The District of Nevada

No. 1217

JOHN A. DUFF, JENNIE R. DUFF, his wife,
and ELIZABETH BRONSON, Plaintiffs,

vs.

H. L. PAGE,

Defendant.

NOTICE OF ENTRY OF JUDGMENT

To Plaintiffs, John A. Duff, Jennie R. Duff, his wife, and Elizabeth Bronson, and to George Wright, Esq., Herman Bedke, Esq., and Harold O. Taber, Esq., their attorneys:

Each of you will please take notice that on November 16, 1955, the following judgments were entered by the Clerk of the above-entitled Court in the above-entitled case:

Judgment entered in favor of the defendant, H. L. Page, and against the plaintiff, Elizabeth Bronson.

Judgment entered in favor of the defendant, H. L. Page, and against the plaintiff, Jennie R. Duff.

Judgment entered in favor of the defendant, H. L. Page, and against the plaintiff, John A. Duff.

Judgment entered in favor of the defendant, H. L. Page, and against plaintiff, John A. Duff, in the amount of \$6,816.58.

Dated this 18th day of November, 1955.

REX J. HANSON,

PIKE & McLAUGHLIN,

Attorneys for Defendant.

/s/ By MILES N. PIKE,

Of Counsel. [53]

Acknowledgment of Service Attached. [54]

[Endorsed]: Filed Nov. 19, 1955.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

To the above-entitled Court and to the Clerk thereof, and to the Defendant and Counterclaimant, H. L. Page, in the above-entitled action, and to Pike & McLaughlin and Rex Hansen, Attorneys for Defendant and Counter-claimant:

Comes Now The plaintiff and counter-defendant, John A. Duff, and the plaintiffs, Jennie R. Duff and Elizabeth Bronson, jointly and severally, and each for himself or herself, moves the above-entitled Court to vacate and set aside each and every of the verdicts of the jury entered on November 15, 1955, and each of the Judgments entered thereon on November 16, 1955, and to grant a new trial of said cause to each and every, all and singular, the said plaintiffs and said counter-defendant, upon the following grounds:

(1) Insufficiency of the evidence to justify any or all of the Verdicts;

(2) That said Verdicts, and each of them, are against law;

(3) Errors in law occurring at the trial and excepted to by each of the plaintiffs and by the counter-defendant;

(4) Irregularity in the proceedings of the defendant and counterclaimant, H. L. Page, by which the plaintiffs, [60] and each of them, and the counter-defendant were prevented from having a fair trial;

(5) Orders of the Court by which the plaintiffs, and each of them, and the counter-defendant, were prevented from having a fair trial;

(6) Accident or surprise which ordinary prudence could not have guarded against;

(7) Irregularity in the proceedings of the Jury by which the plaintiffs, and each of them, and the counter-defendant were prevented from having a fair trial;

(8) Misconduct of the Jury;

(9) Irregularities in the proceedings of the Court by which the plaintiffs, and each of them, and the counter-defendant were prevented from having a fair trial;

(10) Newly discovered evidence material to the plaintiffs, and each of them, and the counter-defendant, which could not, with reasonable diligence, have been discovered and produced at the trial;

(11) Manifest disregard by the Jury of the Instructions of the Court;

(12) Also, upon any other ground or reason for

which new trials have heretofore been granted in actions at law in the Courts of the United States.

Dated: November 18, 1955.

GOLDWATER, TABER & HILL,
HERMAN BEDKE,
WRIGHT & EARDLEY,

/s/ By GEORGE F. WRIGHT,
Attorneys for Plaintiffs and
Counter-Defendant.

Acknowledgment of Service Attached. [61]

[Endorsed]: Filed Nov. 22, 1955.

[Title of District Court and Cause.]

ORDER DENYING MOTION OF PLAINTIFF
AND COUNTER-DEFENDANT FOR NEW
TRIAL

The plaintiff and counter-defendant's motion for new trial came on this 28th day of December, 1955, for argument, George F. Wright appearing for the plaintiff and counter-defendant, and Miles N. Pike appearing for the defendant and counter-claimant, and the matter being fully argued, it was ordered that the matter be deemed submitted for ruling on the filing of briefs, and said briefs having been filed and considered; now, therefore, and good cause appearing, it is

Ordered, that the plaintiff's motion for new trial be, and the same hereby is, denied.

Dated at Carson City, Nevada, this 15th day of March, 1956.

/s/ JOHN R. ROSS,

United States District Judge. [98]

[Endorsed]: Filed March 15, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Jennie R. Duff and Elizabeth Bronson, two of the plaintiffs named above, hereby appeal, jointly and severally, to the United States Court of Appeals for the Ninth Circuit from those two certain final Judgments, and the whole thereof, entered in above action on November 16, 1955, which Judgments appealed from being more particularly set forth as follows:

Judgment entered in favor of the defendant, H. L. Page, and against plaintiff, Jennie R. Duff.

Judgment entered in favor of the Defendant, H. L. Page, and against plaintiff, Elizabeth Bronson.

Notice Is Further Given that said plaintiffs, Jennie R. Duff and Elizabeth Bronson, hereby appeal, jointly and severally, to the United States Court of Appeals for the Ninth Circuit from that certain Order Denying Motion for New Trial entered in the above action on March 15, 1956, insofar

as said Order pertains to plaintiffs, Jennie R. Duff and Elizabeth Bronson.

Dated: April 11, 1956.

HERMAN BEDKE and
WRIGHT & EARDLEY,

/s/ By ROSS P. EARDLEY,
Attorneys for plaintiffs, Jennie R. Duff and Elizabeth Bronson. [99]

[Endorsed]: Filed April 12, 1956.

[Title of District Court and Cause.]

CASH DEPOSIT IN LIEU OF BOND
FOR COSTS ON APPEAL

The plaintiffs, Jennie R. Duff and Elizabeth Bronson, herewith deposit with the Clerk of the above Court the sum of \$250.00 in cash as and for their Bond for costs on appeal.

The condition of this deposit or Bond is that whereas the said plaintiffs have appealed to the United States Court of Appeals for the Ninth Circuit by notice of appeal filed April 12, 1956, from the Judgment of this Court entered March 15, 1956, if the said plaintiffs shall pay all costs adjudged against them if the appeal is dismissed or the Judgment affirmed, or such costs as the appellate court may award if the Judgment is modified, then this Bond to be void and said cash so deposited be returned to said plaintiffs, but if said plaintiffs fail

to perform this condition, said cash so deposited shall be paid over to defendant forthwith.

Dated: April 13, 1956.

WRIGHT & EARDLEY,

/s/ By ROSS P. EARDLEY,

Attorneys for Plaintiffs Jennie R. Duff and Elizabeth Bronson.

The check received for cash bond on appeal in the sum of \$250.00 was written and signed by Messrs. Wright & Eardley, therefore, the receipt was issued to them.

J. P. FODRIN. [100]

[Endorsed]: Filed April 14, 1956.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD AND DOCKETING APPEAL

On the Motion of plaintiffs, Jennie R. Duff and Elizabeth Bronson, and the Court being fully advised and good cause appearing;

It Is Hereby Ordered:

That the time for filing the record on appeal with the United States Court of Appeals for the Ninth Circuit, and for docketing therein the appeal taken by plaintiffs, Jennie R. Duff and Elizabeth Bronson, by Notice of Appeal filed April 12, 1956, is extended to and including July 2, 1956, pursuant

to Rule 73 (g) of the Federal Rules of Civil Procedure.

Dated: May 8th, 1956.

/s/ JOHN R. ROSS,

United States District Judge. [101]

[Endorsed]: Filed May 8, 1956.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
AND DOCKETING RECORD ON APPEAL

On the motion of plaintiffs, Jennie R. Duff and Elizabeth Bronson, and the Court being fully advised and good cause appearing;

It Is Hereby Ordered:

That the time for filing and docketing the record on appeal of Jennie R. Duff and Elizabeth Bronson in the United States Court of Appeals for the Ninth Circuit be, and the same hereby is, extended to and including July 11, 1956.

Dated July 2nd, 1956.

/s/ JOHN R. ROSS,

United States District Judge. [102]

[Endorsed]: Filed July 2, 1956.

United States Court of Appeals for the
Ninth Circuit

No. 1217

JENNIE R. DUFF and ELIZABETH BRON-
SON, Appellants,

vs.

H. L. PAGE, Respondent.

MOTION FOR EXTENSION OF TIME TO
FILE AND DOCKET RECORD ON APPEAL

Come now the appellants, Jennie R. Duff and Elizabeth Bronson, and respectfully move the above Court for an exparte order that the time for filing the record on appeal with the U. S. Court of Appeals for the Ninth Circuit and docketing therein the appeal taken by said appellants by Notice of Appeal to the U. S. District Court of the District of Nevada, on April 12, 1956, and the time for filing the transcript and appellants' statement of points upon which they intend to rely, be extended to and including August 2, 1956.

This Motion is made pursuant to Rule 73(g) of the Federal Rules of Civil Procedure and also Rule 37 of the Rules of the U. S. Court of Appeals for the Ninth Circuit, and is based upon the fact that the Court Reporter has had an eye operation and has not been able to prepare a transcript prior to this time and the ninety (90) [103] days beyond which the District Judge cannot extend the time ex-

pires July 11, 1956, all as more specifically set forth in the Affidavit of appellants' attorney and the Affidavit of Marie D. McIntyre, Court Reporter, filed herewith.

WRIGHT & EARDLEY,
By ROSS P. EARDLEY,
Attorneys for Appellants.

So ordered:

WILLIAM DENMAN,
Chief Judge, U. S. Court of Ap-
peals for the Ninth Circuit.

[Endorsed]: Filed July 3, 1956. Paul P. O'Brien,
Clerk. [104]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America, District of Nevada—ss.

I, Oliver F. Pratt, Clerk of the United States District Court for the District of Nevada, do hereby certify that the accompanying documents and exhibits, listed in the attached index, are the originals filed in this court or true and correct copies of orders entered on the minutes or dockets of this court.

I further certify that the Instructions given by the Court, Defendant's refused instructions and Plaintiff's refused instructions, have been omitted from the record on appeal, same now being a part

of the Reporter's Transcript, in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 10th day of July, A.D., 1956.

[Seal] /s/ OLIVER F. PRATT,
Clerk. [125]

In the United States District Court for the
District of Nevada

No. 1217

JOHN A. DUFF and JENNIE R. DUFF, his
wife, and ELIZABETH BRONSON,
Plaintiffs,

vs.

H. L. PAGE, Defendant.

TRANSCRIPT OF TESTIMONY

Jury Trial

Carson City, Nevada.

November 7, 8, 9, 14 and 15, 1955.

Before: Hon. John R. Ross, Judge.

Be it remembered, that the above-entitled matter came on for trial before the Court, sitting with a jury, the Hon. John R. Ross, Judge, presiding, on Monday, November 9, 1955, at Carson City, Nevada.

Appearances: Wright & Eardley, by George L. Wright, Esq. and Goldwater, Taber & Hill, by Har-

old O. Taber, Esq. and Herman Bedke, Esq., Attorneys for Plaintiff.

Pike & McLaughlin, by Miles N. Pike, Esq. and Rex J. Hanson, Esq., Attorneys for Defendant.

The following proceedings were had: [1*]

H. L. PAGE

called as an adverse witness on the part of the plaintiff, being duly sworn, testified as follows:

Cross Examination

Q. (By Mr. Taber): Will you state your full name please? A. H. L. Page.

Q. Where do you live, Mr. Page?

A. Wells, Nevada.

Q. How long have you lived there?

A. About 23 years.

Q. What is your business or occupation?

A. Garage.

Q. How long have you been so engaged?

A. Since 1937.

Q. When you say garage, do you operate a repair service there in Wells? A. Yes, sir.

Q. Have you done so since 1937?

A. Yes, sir.

Q. Where do you live in Wells, Nevada?

A. One block behind the garage. The streets are not numbered or named.

Q. Married, are you? A. Yes, sir.

Q. What is your wife's name?

A. Dexie. [2]

* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of H. L. Page.)

Q. In connection with your business, do you operate a tow car service? A. Yes, sir.

Q. How long have you operated the tow car service?

A. The present wrecker has been in operation since 1941. I operated a home-made one from '37 to '41.

Q. From '37 then until the end of 1954 you were engaged in the business of towing disabled cars, wrecked cars, in the vicinity of Wells, Nevada, is that true? A. Yes, sir.

Q. In general how much territory do you cover with your tow car in that type of business?

A. I usually went half way between Wells and Elko, half way between Wells and Ely, half way between Wells and Wendover, and to the Nevada State line north.

Q. That would be about to Contact?

A. Well, beyond Contact.

Q. On the road to Twin Falls, Idaho?

A. Yes, sir.

Q. You say you operated a home-made wrecker prior to the one that you have at the present time?

A. That is right.

Q. Is that true? A. Yes, sir.

Q. What type of vehicle was that? [3]

A. Ole '28 model Buick.

Q. And you acquired your present tow car truck in what year?

A. 1941. I bought it in December, 1940 and arrived at Wells with the car January 6, 1941.

(Testimony of H. L. Page.)

Q. What type of vehicle was that?

A. It was a Studebaker make truck.

Q. Was it equipped with a boom or towing equipment when you purchased it?

A. I had the wrecker part mounted on the chassis at Chattanooga, Tennessee, by the Holmes Wrecker people.

Q. What kind of towing equipment does the Studebaker have on it?

A. It is a Holmes, what is known as a Holmes Wrecker Manufacturing Company of Chattanooga, Tennessee.

Q. Just what kind of equipment is that?

A. I don't quite understand what you mean.

The Court: What does it consist of?

Q. Do you have a winch or boom?

A. Oh, yes.

Q. Would you describe it for the Court and jury please?

A. It has two booms. They are about twelve feet long. It is cable power operated. It has winding cables, power to operate it. Raising and lowering the boom is done by hand with a crack.

Q. Each of these booms, you say, are 12 feet long? A. Approximately.

Q. And you use them for different purposes?

A. Yes sir.

Q. Would you explain that to us, please?

A. Depending on the degree of the object you are pulling would control the position of the boom or booms, depending on what you are towing, the

(Testimony of H. L. Page.)

position of the object and what you are intending to do with it, whether you are going to roll it over, pull it up a steep embankment, or what you are going to do with it. It would vary. There are four winches. If you are going to bring a car that went off a sharp embankment, say 45 degree up the embankment, on to the highway, it would be necessary that you have your boom higher, raised higher, for that operation, due to the fact that it would, if you pulled the car up against the foot of the embankment, if you do not have your boom higher, you would be pulling against yourself on the front of the car you were pulling on the highway, up against the embankment, you would be pulling against yourself, rather than have a tendency to lift it up and start it up the embankment, if you were turning over. A heavy truck that has turned over and you are pulling it back on its wheels, you would lower the boom to where you would be pulling directly off the mast on the boom, but directly off of the mast, to keep from pulling the front of your wrecker, tipping it up, raising up the front wheel, gives you more power, then turn the truck over on its wheels. By that method, where you had the booms up where it would pull beyond the booms, it would have a tendency and would continue to be sufficient pull [5] and raise the front of the wrecker right off the ground.

Q. You operated these two booms manually, is that right? A. That's right, sir.

Q. You operated the three pits, so to speak, by

(Testimony of H. L. Page.)

a manual crank? A. That's right.

Q. Did you have a mechanical winch on the wrecker? A. Yes, sir, power operated.

Q. That is operated by the motor of the truck itself, is it not? A. Yes sir.

Q. And in order to engage that winch you would simply take the truck out of gear and put this winch in gear, isn't that true?

A. Well, you have your truck gear shift in neutral and put your power take-off gear to engage it with the transmission, which by a chain you drive the drum that contains the cable on the wrecker.

Q. And the cable extended over the boom?

A. That's right.

Q. You would attach that to the wreck or disabled vehicle, is that true?

A. That's right.

Q. And was that the condition of your wrecker on December 31, 1954? A. Yes sir. [6]

Q. How much did that wrecker weigh?

A. I would say it would weigh, with the tools and equipment in it, around six and a half to seven ton. That is an estimate. I never weighed it.

Q. Now do you recall the 31st of December, 1954? A. Yes sir.

Q. Did you receive a call to take a car out of the barrow pit on the highway between Wells and Elko, Nevada? A. Yes sir.

Q. About what time did you receive that call?

(Testimony of H. L. Page.)

A. Somewhere between 8:30 and 8:45, as best I recall, A.M.

Q. That was in the morning? A. Yes sir.

Q. How did you receive that call, Mr. Page?

A. Capt. Bartz of the Highway Patrol came over to the garage and said he had just received word by a trucker that there was a car and trailer off the road about 14 miles west, two men and a lady and little baby in the car and asked if we could go out and put it back on the road.

Q. That was about 8:30 in the morning?

A. Somewhere around 8:30 or 8:45.

Q. You knew that the car and trailer was off the highway at a point approximately 14 miles west of Wells at that time? A. Yes sir.

Q. And you answered that call? [7]

A. Yes sir.

Q. Did any one accompany you to the scene where this trailer and car were off the highway?

A. Yes sir.

Q. What are their names?

A. Clifford N. Elton, a mechanic, and my grandson, Leonard M. Jewell.

Q. How old is Leonard Jewell?

A. Fourteen.

Q. How old was he on December 31, 1954?

A. He was fourteen. He is just about fifteen now—well, he was fifteen in September.

Q. And he is your grandson?

A. Yes sir.

Q. The other man's name was Elton?

(Testimony of H. L. Page.)

A. Elton.

Q. He is still an employee of yours?

A. Yes sir.

Q. What were his duties in connection with your business? A. He was mechanic.

Q. Did he also assist you in the tow business?

A. He did on occasion.

Q. He accompanied you on this call also?

A. Yes, sir.

Q. And the three of you rode in the seat of the Studebaker [8] wrecker from Wells, Nevada, out to the scene where the car and the trailer were off the road, is that true? A. Yes sir.

Q. What time did you leave Wells?

A. It was only a few minutes after I received the call, around 8:45 to 8:50; maybe 8:45, I don't recall exactly.

Q. Do you recall what time you arrived at the scene where the U-Haul trailer and car were off the highway?

A. I would say it was around 9:30, maybe 9:40, as near as I recall.

Q. Now did you have chains on your wrecker?

A. No sir.

Q. No chains on the tires at all?

A. No, sir.

Q. What was the condition of the highway from Wells to the point 14 miles west of Wells, where the trailer and car were off the highway?

A. The first about 12 miles was spotty, spots of ice, varying anywhere from 25 feet to 200 or

(Testimony of H. L. Page.)

300 feet, where the road would have ice or hard packed snow on it, and then there would be open spots, dry spots, and for the next mile and a half hard packed snow, or up to within a couple of hundred feet of the point of the accident.

Q. So would you say from the point where the trailer and car were off the highway, for a distance of a mile and half east [9] on Highway 40, the highway was covered with hard packed snow?

A. Yes, with the exception of around 150, maybe 200, feet immediately east of the point of the collision.

Q. And what was the condition of the highway for that distance?

A. Snow had melted and it was just slushy. The water was running down the highway.

Q. And you didn't put the chains on your wrecker?

A. No sir.

Q. You didn't consider it necessary?

A. No sir.

Q. About what speed did you drive out there do you estimate?

A. About 40 or 45.

Q. You are well acquainted with the highway between Wells and Elko, are you not?

A. Yes sir.

Q. Been over it many times?

A. Many times.

Q. Been over this section of the highway between Wells and the point where the car and trailer were off the road too, have you not?

A. Yes sir.

(Testimony of H. L. Page.)

Q. Been over that many many times?

A. Yes sir.

Q. Approximately how many times?

A. I wouldn't attempt to estimate it. I have no idea. [10]

Q. Have you been over it many times in winter, that particular stretch of highway between Wells and the point where the U-Haul trailer and car were off the highway?

Q. I have been over it—it varies how many wrecker calls I might have. I might be over it three or four times in one week and might not be over it again for two or three weeks.

Q. But you have been over it many times during the winter weather, have you not?

A. Yes.

Q. You are acquainted then with the various grades and hills and curves on that highway between Wells and the point where the U-Haul trailer and car were off the highway?

A. Yes sir.

Q. Would you say that you are well acquainted with the road? A. Yes, sir.

Q. Now that highway is known as U. S. 40, is it not? A. Yes sir.

Q. That is one of the main transcontinental highways across the State of Nevada, isn't that true? A. Yes.

Q. It is also true, is it not, Mr. Page, that that highway is heavily travelled? A. Yes sir.

Q. And the traffic on that highway is heavy, not

(Testimony of H. L. Page.)

only in the summer time, but also in the winter time, isn't that true? [11]

A. That would depend on what you would term heavy.

Q. Well, you drove it on this particular day, did you not, December 31st? A. Yes sir.

Q. What was the traffic condition at that time?

A. It was heavier at that particular time than it was ten days later, due to the time of the year it was and people returning home, had spent Christmas at various points and there were quite a few more cars on the road at that time than would have been a week or so later, after everybody got home.

Q. I realize this is a difficult question—approximately how many cars did you see on the highway between Wells and the point where the U-Haul trailer and car were off the highway, when you went there that morning?

A. It would be purely a guess. I had no occasion for counting them.

Q. Did you see one car?

A. Oh, I seen more than that. I would estimate I saw at least 25 or 30 vehicles, maybe more, I don't know.

Q. Did you see any trucks on the highway?

A. Yes sir.

Q. Now when you arrived at the scene where the trailer and car were off the highway, what did you observe?

A. The car and trailer off the road, down an embankment.

(Testimony of H. L. Page.)

Q. On what side of the road? [12]

A. On the north side.

Q. The road at that point lies in a general easterly and westerly direction, does it not?

A. Yes.

Q. This car and U-Haul trailer were off on the north side, off on an embankment, is that true?

A. Yes sir.

Q. How many feet off the road were they? Let us take the car first.

A. The car—well, I don't know how far, I imagine around 16 feet off, the car was, and the trailer tongue was probably three feet long and the trailer was about seven feet long; the back end of the trailer was just about two feet from the edge of the highway.

Q. From the edge of highway, referring to the north shoulder? A. North shoulder.

Q. In general what position was the car and the U-Haul trailer when you first observed it?

A. About a 20 degree angle off the road, facing in a northwest direction, the car was.

Q. The car then was facing in a generally northwest direction, is that true? A. That is true.

Q. Are you oriented to the directions in the courtroom? A. No, I am not. [13]

Q. This is north, south, west, east—so that you say the car was facing in a general northwest direction?

A. That's right. Take the courtroom running

(Testimony of H. L. Page.)

this way, east and west, this would be north and that would be south and then I won't get confused.

Q. That would not be true, though. Your back, as you are seated in the witness chair, Mr. Page, is to the south—this is north, this is to your right, is east, to your left is west. Now are you oriented?

A. This is east, west, south and north.

Q. If I understand you correctly, the car and the trailer were still connected? A. Yes sir.

Q. And there is a tongue on that trailer, is there not? A. Yes sir.

Q. And that fits over a ball, a steel ball, on the bumper of the car, isn't that the way it is connected? A. Yes sir.

Q. Then if the car was pointed in a northwest direction, in which way was the trailer situated from the car?

A. Directly behind it, pointing the same direction, other than it was turned over on its right side.

Q. Now when you mention the right side, you are talking about the side of the trailer as it would proceed in a forward direction, isn't that true? [14]

A. Yes sir.

Q. So that the trailer was on its right side?

A. Right.

Q. And was the car on its wheels?

A. Yes sir.

Q. So that the trailer, being on its right side and the car on its wheels, it had twisted this connecting tongue, isn't that true? A. Yes.

(Testimony of H. L. Page.)

Q. The trailer, you say, was about six feet off the north shoulder of the road?

A. You mean the back end of the trailer?

Q. Yes.

A. No, I said about two feet approximately.

Q. The front of the car was how far off the north shoulder of the road?

A. It was the length of the Ford automobile, plus three feet of trailer tongue, seven feet of the trailer bed and two feet. That's it as near as I can estimate.

Q. I don't think you answered my question. From the north shoulder of the highway 40, in a northerly direction, how far was it to the radiator or front of this Ford automobile?

A. I don't understand the question.

Mr. Pike: The other question, he did explain that.

Q. (Illustrates on the blackboard): Now, Mr. Page, I have marked the direction of it here. The top of this blackboard is north, [15] bottom south, this is east and this is west. Suppose this is Highway 40. Now are you oriented to that?

A. Yes sir.

Q. When you arrived on the scene, you found an U-Haul trailer, is that true? A. Yes sir.

Q. And a Ford sedan automobile off on the north side of the road, is that true?

A. Yes sir.

Q. You said that the car was facing in a north-

(Testimony of H. L. Page.)

west direction, is that true? A. Right.

Q. Now have I placed this car in the correct position when you first saw it? A. Yes sir.

Q. Now it was connected with a tongue approximately how long?

A. Approximately three feet.

Q. And behind the car was an U-Haul trailer?

A. Yes sir.

Q. Now have I faced the U-Haul trailer in approximately the right position?

A. Yes sir, except it was turned over.

Q. Now, this being the trailer, it was lying on its right-hand side? A. Yes sir. [16]

Q. The car was on its wheel, is that true?

A. Yes sir.

Q. Headed in a general northwest direction?

A. Yes sir.

Q. The rear then would be headed in a general southeast direction, is that true? A. Yes sir.

Q. Now you said that this U-Haul trailer was about two feet off the north shoulder of the highway? A. That corner of it was.

Q. Now my question is, how off the north shoulder of the highway was the front of the Ford automobile, if you remember?

A. I haven't any way of even estimating the distance. It was from about a 20 degree angle.

Q. When you say 20 degree angle, you are referring to this imaginary 20 degree angle, are you?

A. North.

(Testimony of H. L. Page.)

Q. Do you mean that this would be a 20 degree angle off the north shoulder of the highway 40, is that right? A. Yes.

Q. When you arrived there, Mr. Page, were you able to determine how that car and trailer got in the position in which you found it?

A. No, I didn't pay any attention how it got there.

Q. Did you inquire? [17]

A. No, not that I remember.

Q. You didn't ask any questions? A. No.

Q. Do you know which direction that Ford and U-Haul trailer was travelling before it went off the highway?

A. Not at the time I arrived there, I didn't know.

Q. Did you determine that later?

A. After the accident I found out they were going east.

Q. After the accident that the Ford and the trailer were involved in?

A. No, after the accident with the wrecker.

Q. In which you were involved?

A. Yes sir.

Q. For approximately a mile and a half east on Highway 40, you say the highway was covered with hard packed snow, is that true?

A. With the exception of a couple of hundred feet probably immediately east of the wreck.

Q. And for that 200 feet immediately east of

(Testimony of H. L. Page.)

where you found the U-Trailer you say it was spotty?

A. No, I say it was slushy. The snow had melted and it was just slush.

Q. When you arrived there, did you observe the condition of the highway west of where you found the U-Haul trailer and the Ford? A. Yes.

Q. What was the condition of the highway to the west?

A. It was practically clear; no snow or ice for quite a distance beyond, for so far as I could see.

Q. Approximately how far was that?

A. A mile and a half.

Q. You could see, then the mecadamized portion of this road to the west, is that true?

A. Yes, a little rise and then the highway dropped down and went up another little rise.

Q. And you didn't see any snow to the west of the point on Highway 40 where the car and the trailer were off the road? A. No sir.

Q. What is the first thing you did when you arrived on the scene?

A. Turned my blinker light on just before I arrived at the point of the accident.

Q. Where is that situated on your wrecker truck? A. On top of the cab.

Q. What kind of a light is that?

A. It is a red light; switched on and off, on and off, on and off and you can see it for 360 degrees.

(Testimony of H. L. Page.)

Q. You turned that on before you arrived at the scene where this car and trailer were off the road? A. Yes.

Q. There is a switch then I take it, inside the cab, is that [19] true? A. Yes sir.

Q. Where is that switch located?

A. On the dash.

Q. On the dash board? A. Yes sir.

Q. Did you check the red light to see if it was on after you brought your car to a stop?

A. I have a switch light in the switch itself and you turn it. If the light doesn't turn on top, the light doesn't turn on at the time and no flash. However, I checked it.

Q. It is similar then, to the light treatment on current automobiles, there is a little red light on the dash that indicates when your lights are on from the board and when they are off, from the board, is that true? A. Similar, this is correct.

Q. You did, you say, check your red light that is situated on the top of the cab to see if it was working?

A. I did when I got out of the truck.

Q. Was it working? A. Yes sir.

Q. Then what did you do?

A. Looked over the situation and the car and trailer that was off the road, determined the condition, whether there was a rock underneath the car, for instance, that would hinder [20] it coming back on slip it over on the trailer.

(Testimony of H. L. Page.)

Q. For what purpose.

A. For the purpose I just came here to see what the condition was. I afterward determined the location of the car and the trailer as to what was going to be necessary to put them back on the road without damage to the car or trailer, whatever it might be.

Q. When you first pulled up to the scene where this car and trailed were off the road, did you stop on the highway or on the shoulder?

A. I pulled over as far as I could get to the right-hand side of the highway.

Q. And was your wrecker headed in a westerly direction?

A. Yes sir, would be the north side of the highway.

Q. Then you pulled off, then, on to the shoulder, north shoulder of the Highway 40, isn't that true?

A. That's right.

Q. Did you observe how wide that shoulder was at that time?

A. I don't know whether you would call it a shoulder or not. It was black-top, to the edge of the embankment, with the exception a ridge of black-top material which the highway department put up there to keep the water from coming up and washing down the bank. It was black-top clear over.

Q. You could observe, could you not, Mr. Page, a white center line on the highway? [21]

A. Could I see it?

(Testimony of H. L. Page.)

Q. Yes. A. Yes, I was watching it.

Q. That being true, then, how far was it from the center line where you stopped to the hard shoulder of the road?

A. I was on the north side of the road, as far over as I could get, when I stopped.

Q. I will repeat the question. When you stopped—if this is the car and U-Haul trailer—how far was it at that point between the white center line and the north shoulder of the road? What is the distance between those two?

A. I don't know exactly.

Q. Approximately what was the distance?

A. About 20 feet, maybe 22, I don't know. It may be twenty.

Q. Did you discuss getting the car and U-Haul trailer back on to the highway with the people who were there?

A. I don't understand that question.

(Question read.)

A. No, I had no discussion with them. All they wanted to do was to get it back on the road.

Q. You didn't discuss it with them?

A. You mean the procedure, or how I was going to do it?

Q. Yes. A. No, I had no occasion.

Q., Who made the decision as to the method that you finally used to get the car and U-Haul trailer back on the highway? [22]

A. I did.

(Testimony of H. L. Page.)

Q. And you drove the car from Wells out to this point 14 miles west of Wells, is that true?

A. No.

Q. Who did? A. Mr. Elton.

Q. Who placed the car then in position to get the car and U-Haul trailer back on to the highway?

A. I did.

Q. That is, Mr. Elton drove out there and after you arrived, you drove the car and placed it in position on the highway, is that true?

A. That's right.

Q. Now what position did you place it in?

A. About 20 degree angle in the opposite direction from the way the car and trailer was off the highway.

Q. In other words, you placed your wrecker in that position, is that right. (Illustrating)

A. No. It was approximately behind the trailer.

Q. Yes. Is the angle right? A. About.

Q. Directly behind, would be directly south?

A. In the same alignment with the car and trailer.

Q. Extended here? A. That's right. [23]

Q. Would that be the position that you placed your wrecker? A. Directly behind it.

Q. Now, Mr. Page, how far was the left rear of your wrecker from the north shoulder at the time you placed it in that position A. Right on it.

Q. And how far was the front of your car from the white center line? A. About three feet.

(Testimony of H. L. Page.)

Q. That is the distance between the front of your car and the center line would be three feet, is that true? A. Approximately that.

Q. What is the overall length of your wrecker?

A. Eighteen feet.

Q. And that is from the tail-gate in the back, or bumper to bumper?

A. From the extreme back end of the wrecker, the tail-gate as you call it, to the front of the front bumper.

Q. Eighteen feet, is that right, overall length?

A. Yes sir.

Q. Now just after you placed your wrecker in that position, what did you do?

A. Took the left-hand cable and a chain, fastened the chain on the bottom side of the trailer, bottom side of it, around the wheel, the wheel that was on the ground, and hooked the cable [24] onto the chain, to set the trailer back up on its wheels, which I did, but the embankment was so steep, it wouldn't stay there by itself, unless a little weight was put on it, so Mr. Shaw, the man who owned the Ford, put a little pressure on it to hold the trailer up right while I in the meantime—there was a car coming from the east and a truck coming from the west— and I left the rear end of the wrecker, where the controls are that controls the winches, I left back there and went to the front of the wrecker on the road, and I saw the car and truck coming and I estimated it was going to be too close for a

(Testimony of H. L. Page.)

car to go by before the truck did, and the truck was coming up the hill and it tied up his momentum, a heavy truck, it was much easier for the car coming west, which was a passenger car, to stop and let the truck go by first, so I signalled the car to stop and he did stop and the truck went by and I motioned him to go on up in front.

Q. In other words, this truck was proceeding in an easterly direction towards Wells?

A. That is right.

Q. What kind of a truck was it?

A. Semi-trailer transport.

Q. And the car you just mentioned was proceeding in a westerly direction towards Elko, is that right?

A. Yes sir.

Q. And then the man that was with Mr. Shaw held it so it [25] wouldn't tip over?

A. Mr. Shaw held it himself.

Q. And while he was holding the U-Haul trailer, you saw this situation of a truck going one way and a car the other and you went out to direct traffic, isn't that true?

A. That's right.

Q. Now did you have fuses or flares? Did you carry those with your wrecker?

A. Yes sir.

Q. Did you have them in your wrecker on the morning of December 31, 1954?

A. Yes sir.

Q. Where were they?

A. In the tool compartment.

Q. That is in the bed of the wrecker?

(Testimony of H. L. Page.)

A. No, it is a tool compartment built for that purpose and immediately behind the truck cab.

Q. How many flares did you have?

A. You mean the kind you light?

Q. Yes? A. I had both kinds.

Q. What kind did you have?

A. I had six of the kind that you light that burn with a flare and I had four of the reflector type.

Q. You had six flares that you could light.? [26]

A. They burn kerosene, pot flare.

Q. Are those similar to the smudge pots the construction companies use? A. That's right.

Q. And you had six of that type?

A. Yes sir.

Q. And you had some reflector type also?

A. Yes sir.

Q. How many reflector type flares?

A. Four.

Q. So you had four flares of the reflector type, you had six that burned kerosene and they were situated in the tool compartment immediately behind the cab, is that true? A. Yes sir.

Q. Did you have these with you on the morning of December 31, 1954? A. Yes sir.

Q. Did you put them out on the highway?

A. No sir.

Q. Did you have a flashlight or red light that could be used, other than the one mentioned? Was your truck equipped with that? A. Yes.

(Testimony of H. L. Page.)

Q. And what kind of equipment was that? Can you describe it for us? [27]

A. It is a flashlight with a red part that long.

Q. A red tube or light?

A. Red tube I guess you would call it.

Q. You are indicating about 8 to 10 inches long?

A. Yes, about.

Q. How does that function?

A. Just like a flashlight.

Q. You can turn it on and it will show a red light, is that true? A. That is right.

Q. For what purpose did you carry that in your wrecker? A. To use in case it was needed.

Q. Did you have it with you that morning?

A. Yes sir.

Q. Was it functioning?

A. As far as I know. I had no occasion to use it.

Q. Did you have any other equipment to warn the travelling public of the presence of your wrecker on the road?

A. I had two board signs I carry.

Q. Did you have those with you on the morning of December 31, 1954? A. Yes sir.

Q. What kind of signs are those?

A. It is "Danger," "Look Ahead."

Q. Approximately how large are they? [28]

A. About 18 inches by two and one-half feet, maybe 20 inches wide, 30 inches.

Q. They are rectangular in shape?

(Testimony of H. L. Page.)

A. Something like this here, about 20 inches this way and about 30 inches this way.

Q. And are they rectangular in shape?

A. No.

Q. They are 20 by 30?

A. Yes, approximately.

Q. Is that the shape of the sign? A. Yes.

Q. And it would be 20 inches high, 30 inches in length? A. Something like that.

Q. Are those signs identical? A. Yes sir.

Q. And it had "Danger," "Look Ahead," is that right? A. Yes.

Q. What color were the signs?

A. White background and red letters.

Q. Red and white. The word "Danger, with the word "Look Ahead" side by side underneath?

A. "Danger" on top and "Look Ahead" is underneath.

A. "Look" and "Ahead" is all on one line.

Q. White background with red letters? [29]

A. Yes sir.

Q. What is the size of the letters?

A. I couldn't tell you.

Q. Approximately?

A. Probably four inches. That is purely a guess.

Q. There is a ruler right here—would that be the approximate height?

A. Would be a little higher.

Q. More like this? Then you are not guessing when you say five inches?

(Testimony of H. L. Page.)

A. Yes, I imagine—it is only a guess.

Q. Would you say the height of the lettering you have just given us would be approximately correct? A. As near as I can estimate, yes.

Q. Mr. Page, did you put those signs out after you arrived at the scene of this collision?

A. No sir.

Q. Did you have any other equipment on your truck to warn the travelling public of the presence of your wrecker on the highway? A. No.

Q. So your truck was equipped with six flares of the ignition type that you light, that burn kerosene, is that right? A. Yes.

Q. And it is equipped with four flares of the reflector type. [30] Now can you describe those for us?

A. Just have some stuff on them. You flash a light like you have on trailers, has mercury behind the glass. When the light hits, it shows red or blue or green, whatever it happens to be.

Q. You can put those reflectors out on the highway? A. That's right.

Q. Similar to the flares?

A. Yes. It doesn't show them unless you have a light hit them because they are just their natural color.

Q. If the lights of a car struck these reflectors, the operator of the car would be able to see those reflectors, is that true? A. Yes.

(Testimony of H. L. Page.)

Q. Likewise, if the sun shone on any of those reflectors, it would reflect light, wouldn't it?

A. I imagine that would depend on the condition of the sun. I don't know whether it would or not. It may or may not.

Q. You didn't put these six flares out?

A. No.

Q. You didn't put the four reflectors out?

A. No.

Q. You didn't use your flash equipped with a long red light, you didn't use that?

A. No sir.

Q. Nor did you put the work signs out, is that true? A. No. [31]

Q. And you say you did put the red light on, situated on the top of the cab of the wrecker?

A. Yes sir.

Q. And you knew it was on because the mechanic went inside the cab and told you so, is that right?

A. He did and I also looked.

Q. You looked after you alighted from the wrecker truck, isn't that true? A. Yes sir.

Q. Why did you put this red light on, Mr. Page?

A. It is an emergency vehicle.

Mr. Taber: I move the answer be stricken as conclusion of the witness.

The Court: It may stand.

Q. You put the red light on, did you not, to warn the travelling public of the presence of the wrecker, isn't that true? A. Yes sir.

(Testimony of H. L. Page.)

Q. And you knew that for a distance of approximately a mile and a half to the east of where this Ford and U-Haul trailer were off the road that the highway coated with packed snow, with the exception of the one or two hundred feet you mentioned, is that true? A. Yes sir.

Q. You knew then, when you placed your wrecker in that position on the highway, that it was in a position of danger, did you not, [32] Mr. Page?

A. You are always in danger when you stop a vehicle on the highway. There is a certain amount of danger, yes.

Q. The answer is yes? A. Yes sir.

Q. And you knew that your wrecker was in a position of danger, isn't that true?

A. Yes sir.

Q. And you knew that any one in the immediate vicinity of the wrecker would also be in a position of danger, did you not?

A. That would depend.

Q. Well, let's—did you have any one in the cab operating the mechanical booms and the winch?

A. No.

Q. You didn't have any one in there?

A. No sir, not operating anything.

Q. No one was in the cab?

A. Not operating anything.

Q. Was any one seated in the cab?

A. Yes.

Q. During the time that you righted the trailer?

(Testimony of H. L. Page.)

A. Yes.

Q. Who was that?

A. Mrs. Shaw and her two or three months' old baby.

Q. Where was Mr. Elton? [33]

A. He was uncoupling the safety chains from the trailer hook-up to the car.

Q. And your grandson?

A. I don't know where he was.

Q. You knew then, did you not, Mr. Page, that any one standing, we will say, on this side, or the high-hand side of your wrecker, was in a position of danger, did you not, from the travelling public, when you parked it there?

A. That would depend again.

Q. Well, you say your wrecker was in a position of danger, is that true?

A. It was on the highway, that is true.

Q. And it was in a dangerous position?

A. If any one was walking toward the highway.

Q. Was it possible, Mr. Page, for west-bound cars to go by your wrecker without going over into the east-bound lane of traffic? A. No.

Q. It wasn't possible? A. No sir.

Q. Now you have told us how you saw a truck proceeding in an easterly direction and a car in a westerly direction.

The Court: I think this is a good time to take our mid-afternoon recess.

Jury admonished and recess taken at 3:00 o'clock. [34]

3:15 P.M.

Presence of the jury stipulated.

MR. PAGE

resumes the witness stand on further examination by Mr. Taber.

(Last question read.)

Mr. Taber: I will withdraw that.

Q. If I understood you correctly, Mr. Page, when you saw this truck going in an easterly direction and the car in a westerly direction, you went out and personally directed traffic, is that true? A. Yes sir.

Q. And did you use your flashlight with the red light? A. No sir.

Q. How did you direct traffic?

A. With my hand.

Q. Tell us what you did.

A. I gave them a stop sign; the car that was coming down the hill going west, I gave them a stop sign.

Q. As you are now indicating with your arms?

A. I gave it a stop sign with both hands and he kept on coming down hill and I saw he was under control, stopping, and then I motioned the truck to keep coming.

Q. Where were you on the highway when you were signaling the car and the truck?

A. At the right front corner of my wrecker—the left front corner [35] of my wrecker.

(Testimony of H. L. Page.)

Q. That would be right there?

A. Right there.

Q. That would be in a position by the left front fender indicated by the "x" with the circle around it that I put there, is that true? A. Yes sir.

Q. And from that position you were able to signal the oncoming truck, coming from the east, is that true?

A. I was standing in front of the wrecker, in front of the front bumper of the wrecker, on the left side of the front bumper.

Q. And was there anything between you and the visibility of the driver of the truck?

A. Nothing.

Q. You say the truck slowed down?

A. Not that I could tell it didn't, because I gave him the on signal.

Q. You gave him the come-on signal?

A. Yes sir.

Q. And you gave the oncoming car going west the stop signal, is that right? A. Yes.

Q. What directed your attention to the truck proceeding in the easterly direction and the car in a westerly direction? [36]

A. I was watching.

Q. What time did you say you arrived out here at the scene where this Ford car and U-Haul trailer were in the barrow pit?

A. Around 9:30 I think.

Q. You left Wells at approximately what time?

A. Around 8:45, 50.

(Testimony of H. L. Page.)

Q. So it took you 45 minutes to go the 14 miles, is that true? A. Approximately.

Q. How long had you been at the scene before the U-Haul trailer was righted? By that, I mean placed back upon its wheels.

A. Oh, probably 20 minutes.

Q. That would be about 10 minutes to 10, approximately? A. As near as I recall.

Q. Now after the car and the truck went by the scene, the car in a westerly direction and the truck in an easterly direction, what then happened?

A. I walked from that position indicated by "x" around in front of the wrecker. I looked east and I looked west. There was nothing in sight either direction, except the big truck that was going east, was almost to the top of the hill. There was no other car coming east or west. I walked from that direction indicated by "x" around in front of the tool compartment just behind the cab, stepped up on the running board of the wrecker, raised the compartment door and looked in to see if I had a coat. I left the door down and stepped down off the wrecker—and boom. [37]

Q. By "boom," you mean something happened?

A. Yes.

Q. And what was that, if you know?

A. That was the car that collided with the wrecker.

Q. A car collided with the wrecker?

A. Yes.

Q. How long did it take you, Mr. Page, to walk

(Testimony of H. L. Page.)

from the position you indicated by the "x" with the circle around it, to the right-hand side of the tool compartment, open the lid of the tool compartment and look for your coat?

A. It couldn't have possibly been over eight or ten seconds.

Q. And you then looked to the east to see if there were any cars coming?

A. Immediately when I started around the truck, I looked both ways and then came around the truck.

Q. As you were walking from the left front of your truck around to the tool compartment, you looked in both directions?

A. I looked before I started.

Q. And when you arrived, you opened the lid of the tool compartment to get a coat, is that true?

A. Yes sir.

Q. When you looked to the east, you saw that the truck was almost to the top of the hill to the east, is that true? A. Yes sir.

Q. How far from the top of the hill was the truck? [38]

A. Oh, I would say about six or seven hundred feet, maybe not that far.

Q. And there were no cars coming in a westerly direction in that time? A. Or easterly.

Q. No cars going east? A. No sir.

Q. As you reached the tool compartment to get a coat, then this collision occurred, is that true?

(Testimony of H. L. Page.)

A. No, there was no coat in it. I just looked to see if there was.

Q. And as you looked, the collision occurred?

A. No, I had looked and closed the lid of the wrecker tool compartment and had stepped down on the pavement.

Q. And then you stepped down on the right-hand side of the wrecker? A. Yes.

Q. And how long did that take?

A. It couldn't have taken over eight or ten seconds from the time I left the front until I had walked around and raised the tool compartment lid and closed it and stepped down on the ground and the accident happened.

Q. So from the time you left the left front of your wrecker until the time this collision occurred, it was eight or ten seconds?

A. Not any more. [39]

Q. You didn't see a car coming?

A. No sir.

Q. What is the next thing you remember?

A. Lying there on my back.

Q. Where?

A. On the highway, on the south shoulder.

Q. In the vicinity of where your wrecker was?

A. Quite a ways down the highway from where the wrecker was standing.

Q. Approximately how far?

A. About twenty feet.

Q. To the south?

(Testimony of H. L. Page.)

A. It would be diagonal from the way the wrecker is going.

Q. Southwest?

A. Well, it would be this way—yes, southwest.

Q. This is south, and you were on the south shoulder, lying on your back? A. Yes sir.

Q. That is the next thing you remember?

A. Yes sir.

Q. Were you knocked unconscious?

A. No.

Q. What did you do then? A. I got up.

Q. And then what? [40]

A. I walked back around on the north side of the wrecker. I walked back toward the trailer and the pick-up and the DeSoto car.

Q. Yes, and then what?

A. I met Mr. Duff walking toward me.

Q. At the time this collision occurred, you say Mrs. Shaw and the baby were seated in the cab of the wrecker? A. Yes sir.

Q. Was any one else seated in the cab?

A. No sir.

Q. Are you sure of that? A. Yes sir.

Q. Referring to page 39 of the transcript of the Elko trial, the testimony of Mr. Page, commencing at line 12. Do you remember testifying, Mr. Page, at a trial held in Elko, Nevada, during April of this year? At that time, Mr. Page, I will ask you if it isn't a fact that the following questions were asked you and you gave the following answers:

(Testimony of H. L. Page.)

“Q. Who was in the cab of the truck while the trailer was being righted? Was there anybody?

A. Mrs. Shaw. Q. And anybody else? A.

My grandson going out there. Q. What was his name? A. Leonard Jewell.” Did you not so testify?

A. I did, but I also said that going out there to the point of the accident that my grandson was in the cab, to the point of the accident, not at the time after I arrived at the accident. It [41] so states here.

Q. The question was, who was in the cab of the truck while the trailer was being righted, was there anybody? “A. Mrs. Shaw. Q. And anybody else? A. My grandson going out there.”

A. That was going out there.

Q. You so testified?

A. Yes, sir. He was in the cab going out there. I didn’t intend to testify he was in the cab with Mrs. Shaw.

Q. Now, Mr. Page, when you walked around, after signaling the truck to come on and the car to stop, just prior to the time of this collision, where was Mr. Elton?

A. He was engaged in removing the safety chains on the right side of the trailer hitch from the car.

Q. From here, is that right? A. Yes.

Q. Where was your grandson?

A. The last time I saw him, when I walked out to take care of the traffic, the truck and car,

(Testimony of H. L. Page.)

I saw coming, he was standing by the side of the back end of the car, talking to Mr. Elton.

Q. He was standing about where?

A. About right there.

Q. Mrs. Shaw was seated in the cab of the car then as you walked around the front of your wrecker? A. Yes sir.

Q. Did you ask Mrs. Shaw to look out for traffic while you [42] were looking for your coat?

A. No sir.

Q. You didn't? A. No sir.

Q. Now as a result of this collision, Mr. Page, you were injured, were you not? A. Yes sir.

Q. Tell us how you were injured?

A. I was struck in the groin, was knocked off the highway. Injured in that region and I have conditions now that I never had before.

Q. And what is that condition?

A. My sex life is nil.

Q. You are unable to have marital relations with your wife? A. Yes sir.

Q. And has that continued since December 31, 1954? A. Yes sir.

Q. To the present time? A. Yes sir.

Q. Prior to the collision, I assume that you and Mrs. Page maintained a normal marital relation?

A. Yes.

Q. And how many times a week did you and she have marital relations prior to December 31, 1954?

Mr. Pike: Your Honor, I do not think that is

(Testimony of H. L. Page.)

a proper [43] question to ask any witness, for that matter. It is not a pleasant subject for Mr. Page. I think we have the facts of it and the extent of his injuries, but to go into a matter of that sort seems highly improper. I can't imagine circumstances where the number of times of relationship would have any bearing upon any such situation.

Mr. Taber: Your Honor, I admit it is a rather delicate subject, but this man is asking for twenty thousand dollars damages from Mr. Duff and the basis is the injury which he received which prevents him from having marital relations with his wife, and I am certainly entitled to go into this.

The Court: Is that the residual effect of it? There is no other remaining damage?

Mr. Taber: The only one he is claiming I know of.

Mr. Pike: So far, because he hasn't finished his testimony in that regard.

The Court: Gentlemen, inasmuch as this witness's complaint for damages is based upon his loss of sexual power, I do not see any reason why he can't testify to it. You may answer the question. Objection overruled.

Q. Do you want the question again?

A. If you please.

(Question read.)

A. Twice or three times. [44]

Q. Since the accident, you are unable to have marital relations with your wife?

A. Yes.

(Testimony of H. L. Page.)

Q. How old are you, Mr. Page?

A. Fifty-six.

Q. On December 31, 1954, you were 56?

A. No, 55.

Mr. Taber: That's all.

The Court: Do you desire to question the witness at this time, Mr. Pike?

Mr. Pike: Yes, I would like to.

Examination

Q. (By Mr. Pike): Mr. Page, on the morning of December 31, 1954, what were the conditions of the atmospheric visibility in the area where the Shaw car was off the highway?

A. Unlimited.

Q. And but for having your view obstructed by the surrounding hilly area there, advise what was the terrain? Were you able to have an unobstructed view?

A. Yes sir.

Q. Now will you describe the general area in which the Shaw car was off the right, or north, shoulder of the road? Generally what sort of an area was it? Describe the highway on each side of it.

A. It was going down a slight grade. [45]

Q. Coming from which direction?

A. Coming from the east to the west, it would be going down a slight grade, and the car and the trailer was off the highway immediately to the east end of a cut and the beginning of a fill and

(Testimony of H. L. Page.)

down an embankment of about eight feet or so, at about a 45 degree angle.

Q. Then just immediately east of where the Shaw car was by a cut, you mean that the highway had been altered and the earth had been removed by a cut? A. Yes sir.

Q. And then by fill you mean the earth had been filled in, a depression there and a fill, is that right? A. Yes sir.

Q. All right. Now going west from where the Shaw car was, could you describe the general land?

A. It was upgrade going east for a distance of probably twenty-one to twenty-two hundred feet, leveled off.

Mr. Wright: That is going east you are talking about?

Q. Now I ask you about going west from where the Shaw car was. What you just answered, that was going east from there? A. Yes sir.

Q. Now tell us about going west from where the Shaw car was.

A. The road was perfectly straight, slight grade going down for just probably 400 or 500 feet, and then it leveled off.

Q. And then where did it go from there? [46]

A. For a distance of probably three-quarters of a mile it was level and just a slight rise in the ground and it started down a very slight grade.

Q. Now from where you were, where you stopped your wrecker, can you approximate, in

(Testimony of H. L. Page.)

terms of fractions of miles or yards or feet, or any way you want to do it, the distance that you could see back toward the direction from which you had come; that is, toward the east; and likewise the distance on toward the west, toward Elko, that you could see at that time.

A. To the east, where the trailer and car was off the road, to the east I could see about 2100 or 2200 feet.

Q. That is, you could see the highway?

A. Yes, sir, I could see the highway.

Q. And why couldn't you see it a further distance than that? A. It drove over the hill.

Q. Going on east? A. On east.

Q. How about going on west, so far as ability to see the highway was concerned?

A. You could see for approximately two miles, a mile and a half to two miles west from the point where the car was off the road.

Q. Then standing here at the front of the wrecker, you were in a position to view these distances of highway and you say you looked to the west and looked to the *west* as to any traffic coming from either direction, is that correct? [47]

A. Yes sir.

Q. Now you have testified to certain flares and flashlights, signs, that you had in the tow car on that day, and will you give your reason for not using any of that equipment?

Mr. Taber: I submit that calls for conclusion of the witness. After all, the standard of care that

(Testimony of H. L. Page.)

is required out there is ordinary care, and I think it is up to the members of the jury to ultimately decide that question.

The Court: This witness has testified what he, as an ordinary person, thought was necessary under the circumstances. Objection overruled.

(Question read.)

A. I didn't feel that it was necessary, due to the fact that you could see any one approaching from the west, could see the wrecker for approximately a half mile, and that is as far as I would have had a flare out had the condition existed that obstructed the view closer to the wrecker, and it could be seen for a mile and a half or two miles coming from the opposite direction, and I didn't consider it was necessary to put out flares or signs of any kind. It was bright daylight, the sun was shining and it was clear. There were a few clouds in the sky.

Q. And in that connection, you testified to a passenger car coming from the east, headed toward the west, and a truck coming from the west, headed toward the east, and you having signaled [48] the passenger car to stop and having signaled the truck to proceed on to the east. Now could you at this time recall approximately how far a distance the passenger car was from you when you undertook to signal it to stop?

A. Oh, I would estimate it perhaps a thousand feet.

(Testimony of H. L. Page.)

Q. And based upon your observation—was your signal to stop *headed at* the driver of that car?

A. Yes sir.

Q. From any observation that you made, was any difficulty experienced by that car in stopping?

A. No sir.

Q. Now with reference to the truck, if you can, state at this time the approximate distance that he was from you when you motioned to him to come on?

A. He was about a thousand feet west of the wrecker.

Q. And after you signalled to the truck, did the truck continue to come ahead and thereafter proceed on *west*? A. Yes.

Q. Now during the time that you were there, prior to the accident, do you recall whether or not any other vehicles, either east-bound or west-bound, passed the scene where your wrecker was placed?

A. Yes sir.

Q. And will you state the facts in that regard, as you recall?

A. Some 15 or 20 cars and trucks that had passed by that point [49] from the time I arrived and the accident occurred, going in both directions.

Q. And will you state whether you observed any of those cars having any difficulty in passing your wrecker? A. No sir.

Q. Had there been any delay or required stopping on the part of any such vehicles, either west-bound or east-bound, during the time your wrecker

(Testimony of H. L. Page.)

was stopped there, by the traffic you have just referred to was going by in both directions?

A. It wasn't necessary for me to stop any other car. They were so coming a car coming east would have had plenty of time to go by before the car coming east from the west would reach the point, so they just went by.

Q. Now will you state whether or not these reflector type flares were customarily used at night?

A. Yes sir.

Q. And under what general conditions are other flares placed?

A. When it is snowing heavy or when it is foggy or bearing on a curve or immediately around a curve, then I used the procedure I put signs back a half mile in both directions, with the kerosene type flare setting in front of each one of them.

Q. Were there any conditions existing at that time that, in your best judgment, required the use of flares or flashlight or any of the other kinds?

A. No sir. [50]

Q. After your wrecker had been placed in position to bring the trailer and the Ford owned by Mr. Shaw back on to the highway and in the general direction of the line made by the Ford and trailer, will you state the condition of the south traffic line south of the center line on the highway, so far as having any obstructions of any nature in it was concerned, in the vicinity of the wreck?

A. It had none; it was open.

Q. And referring to this diagram, showing the

(Testimony of H. L. Page.)

Ford, trailer and the wrecker, can you state approximately the distance between the rear end of the tow car and the rear end of the trailer?

A. About two feet.

Q. Then if this diagram were considered to be drawn approximately to scale, the distance presently existing shown on the diagram between those two points would be exaggerated, wouldn't it?

A. Yes sir.

Q. I believe you testified that the U-Haul trailer was approximately seven feet long, as you recall?

A. Yes sir.

Q. And that the tongue, or portion of the trailer used to hitch the trailer to the Ford car, was approximately three feet long? A. Yes.

Q. And on the diagram, if that would make a distance of ten feet, would the distance between the rear end of the trailer and the [51] rear end of the *trucker* appear substantially the same distance, or about ten feet, if those were considered to be the scale? A. Yes sir.

Q. So it is not the scale? A. No sir.

Q. In other words, the rear end of the wrecker and the rear end of the trailer would necessarily be much closer together if they were to be placed relatively, according to the length of the trailer and car to the two feet between the trailer and the wrecker, is that correct? A. Yes sir.

Q. Now I believe you testified that your front end of the wrecker or tow car was not as far south on the highway as the center line, and will you

(Testimony of H. L. Page.)

please state, from your recollection, how far the southernmost part of the tow car was north of the east and west center line of the highway?

A. About three feet from the southernmost part of the wrecker to the center line.

Q. Now will you describe the color of the trailer?

A. It was an orange color, I thought.

Q. And do you know whether or not it had any lettering on it? A. Yes, it had lettering on it.

Q. And if you know, will you tell the color of that? A. Black.

Q. What was the general name applied to this trailer? [52] A. U-Haul.

Q. Is that the same type U-Haul trailer that is seen on many occasions on our highways now?

A. Yes.

Q. For approximately how long had the trailer been placed back on its wheels prior to the time of the accident?

A. Just probably a couple of minutes.

Q. And then referring to the color of this U-Haul trailer, as it was on its wheels and its right side, that is, facing when the trailer was toward the east, what was the color on the side of the trailer toward the east? A. Orange.

Q. Now if you know, will you state the color of the Ford car? A. It was a green car.

Q. And will you state the color of your tow car or wrecker?

(Testimony of H. L. Page.)

A. The body of the wrecker is dark blue, the top of the cab is a light blue.

Q. Is there any particular reason for having two colors on the wrecker, what we call a two-tone, rather than one solid color, in your opinion?

A. Yes sir. The engineers from the wrecker people who built the wrecker and painted it, suggested the two-tone color and the color I had it painted by them at the time was a dark blue and light blue and they stated, the safety people, the dark blue on a light terrain would show up and the light blue above it against [53] the dark background, it showed up more than a solid color of any kind.

Q. Coming to this light on top of the cab that you refer to as a blinker light, I believe, when did you turn that light on with reference to the time that the tow car was in the vicinity of the Shaw car off the highway?

A. I turned it myself when we first came over the crest of the hill and saw the car and trailer off to the side of the road, I turned it on then.

Q. And following the accident, in which the De Soto car and the tow car were involved, do you know whether or not the blinker light was continuing to burn on top of the cab of the tow car?

A. Yes sir, I do.

Q. Was it burning or was it not burning?

A. It was burning.

Q. And thereafter did any person turn the blinker light off?

A. Not until some time after the wrecker was

(Testimony of H. L. Page.)

being driven back to Wells, about five miles an hour, I turned it off when I met the ambulance coming from Wells out to the scene of the accident, I turned it off at that point. I looked at my indicator and saw my red light was still on and I turned it off. That was about six miles east of the point of the accident.

Q. Now going from your garage at Wells to the scene of the Shaw car, what persons were riding in the tow car with you?

A. Mr. Elton, my grandson, Leonard Jewell.

A. And what persons were in the cab of the tow car at the time of the collision with the De Soto car?

A. Mrs. Shaw and her young baby.

Q. Now with reference to the time that you arrived at the Shaw car with your tow car, when did Mrs. Shaw and her baby get in the cab of the tow car?

A. Immediately after I arrived.

Q. And generally what was the temperature or weather condition at that time?

A. It was, I imagine, around 50 degree temperature and 20 or 25 mile an hour wind blowing. She was cold, her and the baby. I had the heater on in the wrecker and she asked me if she could get in with the baby out of the cold.

Q. After you had arrived at the trailer, you testified that you were looking for a coat?

A. Yes.

Q. Did you have any coat on before that?

A. I had a light one on and my jacket.

Q. Now after the collision of the De Soto and

(Testimony of H. L. Page.)

the tow car, what was the condition of the windshield in the tow car? A. It was broken.

Q. Was it in place? A. Yes sir.

Q. And what was the general condition of the tow car itself, as to the points of damage on it?

A. Very badly damaged on the left side on the center of the left front fender clear to the rear end of it. The rear wheels were setting at about 10 to 15 degree angle across west of the wrecker, instead of setting under it. The frame was badly damaged. The running board knocked completely off. The rear fender was just barely hanging. The door of the wrecker, the sill underneath the door, was badly caved in and the door itself open. The booms were broken apart. The wrecker is fastened together with cast iron and they were broken.

Q. Thereafter were you able to move the tow car under its own power back to your garage at Wells? A. Yes sir.

Q. Did you do that? A. Yes sir.

Q. At about approximately what speed?

A. About five miles an hour.

Q. Thereafter you had repairs made to the tow car, did you not? A. Yes sir.

Q. About how long was it before you had the use of the tow car after that?

A. I didn't get the tow car back from Salt Lake City until February 25th or 26th, 1955.

Q. And you have handed your attorneys the repair bill for repairing that car, have you not?

A. Yes sir. [56]

(Testimony of H. L. Page.)

Q. Coming now to the time after the De Soto had collided with the tow car and you got up and walked back toward the wrecker and saw Mr. Duff, would that mean John Duff, who is in the court room today? A. Yes sir.

Q. Let me inquire first, when you got up, was the wrecker in the same place that it had been on the highway prior to such collision?

A. No sir.

Q. Where was it after the collision, with reference to where it had been before the collision?

A. It would be about the point of the arrow across the white line.

Q. You are referring now to this diagram on the blackboard and the arrow is at the edge of it?

A. The center of the highway.

Q. It would be the southernmost point on that arrow that designates generally the width of the highway, from the center line to the north shoulder, is that correct?

A. Yes, I estimate about 60 feet it was north.

Q. When you had placed your wrecker in position, prior to righting the trailer on its wheels, what, if anything, had you done with reference to the brakes in the trailer?

A. I had shut the brakes and the braking system on the wrecker with the lever that you can block all four wheels and will hold [57] them on until you turn the lever to release the pressure; 3200 pounds pressure on all four wheels.

(Testimony of H. L. Page.)

Q. What is the general character of the brakes you have on this wrecker?

A. They were in good condition. They were hydraulically operated and this mechanism was one of the standard mechanisms they use on all power brakes to hold them on a hill. You can go off and leave them for 24 hours and still have the wheels locked on the vehicle. You push down on the brake pedal and take this lever and pull it down and as you pull it down, you force the brake fluid through the line against the brake solution on the wheels and it stays there and doesn't release.

Q. Had you so set the brakes on the tow car prior to the time it was struck by the De Soto car?

A. Yes sir.

Q. Now had you taken any other steps with reference to the holding of the wheels of the tow car in place during the operation of bringing the trailer and Ford car back on to the highway?

A. Yes sir.

Q. What had you done?

A. Got some blocks. Put some cross ties to the two dual tire wheels, about six inches longer than the width of the dual tires and by about 8 by 10, and I put them behind each dual rear wheels.

Q. Those were blocks that you had with you in the tow car?

A. Yes sir. [58]

Q. And if you recall, which way was the tow car facing on the highway after being struck by the De Soto?

A. It was almost east.

Q. Facing toward the east?

A. Yes sir.

(Testimony of H. L. Page.)

Q. And you stated you walked from where you were on the highway. Now according to your best recollection, where were you when you got yourself up and started walking again after the collision?

A. I was just opposite the rear wheels of the wrecker on the shoulder of the highway to the south.

Q. That is the wrecker as it was in its new position? A. That's right.

Q. Were you south of its rear wheels, of the tow car? A. Yes sir.

Q. And would that place you in the north lane or south lane of the highway?

A. South side of the highway.

Q. And from there you walked back to what point before you met Mr. Duff?

A. Just about the front end of the wrecker on the north side of the wrecker.

Q. Had you observed at that time where Mr. Duff's car was, or the position of these other vehicles, the Ford and the trailer?

A. It was off about two-thirds way off the highway, down the embankment. [59]

Q. Where was it with reference to the Ford and the trailer?

A. It was to the right of it. It would be north.

Q. That is to your right?

A. Yes, I believe to the right of the U-Haul trailer.

Q. Off the road? A. Yes sir.

Q. Where was Mr. Duff when you first saw him?

(Testimony of H. L. Page.)

A. He was walking back toward me from his car.

Q. Was he on the highway at that time?

A. Yes sir.

Q. Were there any other persons present in that immediate vicinity at that time?

A. Yes, Mr. Shaw and his brother-in-law and Mrs. Shaw and Mr. Elton. I don't know whether the grandson had come back out of the field or not.

Q. Those were the people who were generally at the scene of the accident? A. Yes.

Q. And of course Mr. Duff and the other occupants of his car were there? A. Yes.

Q. Besides the Shaws and the people who accompanied you out there. And did you have any conversation with Mr. Duff at that time?

A. Yes sir. [60]

Q. And will you state what that conversation was?

A. I asked him why he hit the wrecker, and he said, "I didn't see it." And I pointed to the red light still blinking on the cab. I said, "How could you keep from seeing it, as big as it is and the red light blinking on top?" and he said, "I don't know." I said, "How fast were you going?" He said, "About 70 or 80 miles an hour."

Q. Did you have any further conversation with him? A. No sir.

Q. Did you observe the position of the Ford and the trailer following the collision? A. After?

Q. Yes, after the collision, as to where they

(Testimony of H. L. Page.)

were; if their positions were changed in any way?

A. They were knocked still further away from the highway in the direction they were prior to the accident.

Q. Did you notice any apparent damage to either of those two vehicles, resulting from the collision?

A. Yes sir, the trailer and the car both were damaged.

Q. What portions of the trailer were damaged?

A. The back end of it and also the tongue to hitch on to the car.

Q. And what about the Ford car, was there any apparent damage to that?

A. Yes sir, it was damaged. Damaged the back end of the car.

Q. And thereafter was the Ford car and also the trailer removed [61] to some garage?

A. Yes sir.

Q. Where were they taken to?

A. They were brought into my garage.

Q. After that you had further opportunity to examine the damage that had been sustained, is that correct? A. Yes.

Q. Mr. Page, I believe you testified you have lived in Elko County for many years?

A. Yes sir.

Q. How much of that time were you there at Wells? A. About twenty-three years.

Q. And generally in the operation of your tow car service, what help do you have in carrying on

(Testimony of H. L. Page.)

the business of getting vehicles back on the road, tow car service?

A. Ordinarily I didn't take any one. I did it alone.

Q. Was that true as a year-around business, both good weather and bad? A. Yes sir.

Q. And generally what would be the various types of vehicles that you would handle with this wrecker, from the time you got it in 1941 until the time of the collision?

A. All kinds of vehicles—trailers, two wheels, four wheels, passenger cars of all makes and trucks, PIE, Garrett moving equipment. [62]

Q. Your equipment was such that you were in a position to take care of these larger vehicles as well as smaller ones?

A. It was a six-ton truck.

Q. And when you receive a call requiring services of your tow car generally, who accompanied you when you responded to render tow car assistance?

A. Most of the time I did it myself.

Q. And will you state whether or not your physical ability and health was such as to enable you to do that without any undue stress?

A. Yes sir, it was.

Q. At that time, Mr. Page, about how tall were you, how much did you weigh?

A. Prior to the accident?

Q. Yes.

A. Weighed 145 pounds, 150.

(Testimony of H. L. Page.)

Q. And your height is what?

A. Five 11½.

Q. Generally you had good health all during that period of time? A. Yes.

Q. And you and Mrs. Page have how many children?

A. Three; two by a former wife who died. Five children altogether.

Q. How long have you and your present wife been married?

A. Twenty-eight years. [63]

Q. When you got up off the highway, how did you feel? A. Terrible.

Q. Where did you hurt?

A. In my head and in my groin. I couldn't straighten up.

Q. And thereafter did you go to see a doctor at Elko? A. Yes, sir.

Q. Is that Dr. Hood? A. Yes sir.

Q. And Dr. Hood told you your physical condition as he viewed it? A. Yes sir.

Q. And more recently, about the 15th of October, 1955, did you go to see Dr. Hood again?

A. Yes sir.

Q. And in connection with that, did he tell you his views with reference to the injuries you had sustained and the probability of your recovery from them? Don't tell what he told you, but say whether or not he has advised you in that regard?

A. Yes sir.

(Testimony of H. L. Page.)

Q. Since the accident have you had physical pain? A. Yes sir.

Q. And generally in what portions of the body have you had that pain? A. In my groin.

Q. Has that been just a pain that is occasional, or how would you characterize it? [64]

A. At times it is quite painful, lets up and don't have it any more for two or three or four days or a week, then it comes again.

Q. Has there been any apparent progress towards your being able to resume a normal sex life? A. No sir.

Q. Has your condition continued in that regard the same as it was following the accident?

A. Yes sir.

Mr. Pike: I think that is all for the present, your Honor.

Recross Examination

Q. (By Mr. Taber): Mr. Page, when you went to Dr. Hood, he practices in Elko, does he not?

A. Yes sir.

Q. When you went to Dr. Hood, following this accident in the early part of January, and again in May of this year—you recall, do you not, going to see Dr. Hood? A. Yes.

Q. He took a history; that is, he asked you a lot of questions, did he not, about how you felt?

A. Yes.

Q. What your complaints were, isn't that true?

A. Yes.

(Testimony of H. L. Page.)

Q. Just like Mr. Pike, he asked you where you hurt, isn't that right? [65] A. Yes.

Q. And he also asked you questions concerning your marital relations with your wife, isn't that true? A. Yes.

Mr. Taber: That's all.

Jury admonished and recess taken at 4:30 p.m.

Tuesday, November 8, 1955, 10:00 a.m.

Presence of the jury stipulated.

The Court: Mr. Clerk, I hand you a series of photographs with tabs on, showing plaintiff's and defendant's. If you will please mark these in evidence, subject to a statement as to stipulations concerning them. Do you want to stipulate the map?

Mr. Wright: So stipulate.

Mr. Pike: That is agreeable.

The Court: The map will be marked as plaintiff's Exhibit 13.

Clerk: Photographs, plaintiff's Exhibits 1 to 12 inclusive; defendant's photographs, Exhibits A to C inclusive.

The Court: The exhibits marked represent, first, the De Soto automobile plaintiff was driving. Now I am making this comment, so you can identify them. These three pictures of the [66] automobile were evidently taken inside the garage and are numbered Plaintiffs' 1, 2, and 3. Gentlemen, I think there is a stipulation as to this particular group, if you wish to state that.

Mr. Hanson: If your Honor please, the defendants stipulate that Exhibits 1, 2, and 3 are photographs of the plaintiff Duff's automobile, taken after the accident, and that they were taken inside the garage with a flash operated camera. The defendant does not stipulate that the color of the car or its appearance is correctly shown by the photographs. However, they are pictures of the car after the accident and do show the condition.

Mr. Wright: We accept the stipulation, if the Court please; that is correct.

The Court: That takes care of the Exhibits 1, 2, and 3. Exhibits 4, 5, 6, and 7 apparently represent the wrecker inside of the garage, where the pictures were taken.

Mr. Hanson: May it please your Honor, the defendant also stipulates, with respect to Exhibits 4, 5, 6, and 7, that they are photographs of the wrecker, taken in the garage, with a flash operated camera after the accident happened. However, the defendant does dispute that the photographs correctly show the color of the wrecker or its appearance, so far as the color is concerned. We do not stipulate to that. Then, if your Honor [67] please, defendant also does not stipulate that the photograph shows the full extent of the damage to the wrecker.

Mr. Wright: If the Court please, the plaintiffs accept that stipulation, and could we have it further stipulated those pictures were taken on or about January 4th of 1955.

Mr. Hanson: It may be so stipulated.

Mr. Wright: In other words, the question of the color is a question for proof and you are not stipulating that that was the color, that is a question of proof. The extent of damage would be the same thing.

Mr. Hanson: To make it clear, the defendant does not stipulate that those pictures do correctly show the color or appearance of the wrecker, so far as color was concerned; also defendant does not stipulate that those pictures show the full extent of the damage.

Mr. Wright: We accept that.

The Court: Exhibit A apparently represents the U-Haul trailer and this picture was taken outside.

Mr. Hanson: Your Honor, the substance of the same stipulation on Exhibit A of the U-Haul trailer. It is a photograph of that trailer after the accident, and we dispute that it shows the color of the trailer as it was, or that it shows the appearance of the trailer, so far as color is concerned. Also I think the photograph is merely a photograph of one side of the trailer and may not show the extent of the damage, but [68] we do agree it shows the damage so far as it shows in that picture.

Mr. Wright: We accept the stipulation.

The Court: Exhibits 9, 10, 11, and 12 represent a picture of what I assume to be Highway 40. What is your stipulation?

Mr. Hanson: May it please your Honor, the defendant is willing to stipulate, with respect to these latter exhibits, 9, 10, 11, and 12, they are photographs of the Highway 40, taken east of the

place where the accident happened; that these photographs may be introduced in evidence for illustrative purposes, to show the physical characteristics of the highway, that is, the surface, with the general view as you come over the hill immediately east of where the accident happened, going west, but, of course, the defendant does not agree, and the plaintiffs do not contend, that those photographs show conditions as they were at the time the accident happened. The defendant also refuses to stipulate, or does not stipulate, that any automobile shown on the photographs has any significance whatsoever, because the photographs were taken a long time after the accident occurred, and so far as the defense is concerned, will be introduced only for illustrative purposes.

Mr. Wright: If the Court please, we accept that stipulation. I might say the pictures were taken on March 31, 1955, and it is stipulated that there has been no change in the [69] construction of the highway from the time of the accident up to the time the pictures were taken. As to what might or might not have covered the road or what the weather was, things like that, is a question of proof. They are for illustrative purposes.

The Court: That leaves for the plaintiff a map. Is there any stipulation?

Mr. Wright: If the Court please, before we come up to the map, I wonder for reference to those pictures, we have the deposition of Mr. Fox.

Mr. Hanson: If you will check with the deposition and indicate the position where the camera was

held, the distance from the approximate center, we will accept that and you won't have to read the deposition.

Mr. Wright: It is in the deposition.

Mr. Hanson: I think we should have this qualification—if he were called, he would so testify.

Mr. Pike: Of course, it is recognized Mr. Fox's testimony with reference to any vehicles appearing in the photographs is objectionable.

The Court: We all understand the pictures were taken at a time after the accident, that any type of vehicle naturally does not fit the time and place. Very well—how about the map, Exhibit 13?

Mr. Pike: With reference to this map, your Honor, this, [70] of course, is not a map prepared by Mr. Settlemyer, the surveyor. It is prepared by an engineer of Reno, Nevada, and it is stipulated that this correctly depicts the plane view of U. S. Highway 40 and the general vicinity in which the accident occurred, showing the stations; that is, the designation given for the particular points on that highway in terms of numbers, and that plane view is drawn to a scale of one inch on the map representing 100 feet on the ground, so that the distance can be computed by counting the one inch distances on the plane view of the highway as you look at it from the top. Likewise drawn to that same scale there is a profile view, showing the figures 3.34 percent, as being the grade existing in that area, and likewise there is a profile view; that is, you look at the highway from its side, place on this graph paper, with the same scale as appears in the plane

view; that is, one inch on the map representing 100 feet on the ground, and that the grade is 3.34 percent means that there would be a vertical rise in the surface of the highway for every 100 feet traveled in the lateral distance. If you traveled 100 feet along the highway, the highway would rise 3 and one-third feet high. We will stipulate the map being admitted in evidence with that understanding and recognition of its characteristics. I might say, too, that the map has certain salient features indicated on the plane view of the map, projected on to the profile of the map. For example, the color, a certain cut, the guide post and one indication [71] that it may be necessary to refer to Mr. Settlement-meyer's deposition on it, as indicating the possible point of impact, for the reason that a piece of chrome metal was found at this particular point on the highway. Other than that, we accept it as correctly depicting the highway and the essentials just referred to.

Mr. Wright: May it please the Court, we accept that stipulation and we might call attention that there is one profile which is drawn to the scale of one inch equals 10 feet and the other that one inch equals ten feet, and the other that one inch equals 100 feet and that with reference to what the proper practice is in drawing it, etc., I do not know whether that is necessary to put that in at all.

The Court: Now on behalf of the defendant, we have three photos, representing the wrecker and tow car, taken outside and in the daylight apparently,

A, B, and C. Is there any stipulation in connection with those?

Mr. Wright: Those exhibits, defendant's A, B, and C, it is stipulated that those three pictures may go into evidence, as showing the defendant's wrecker, and it is the same wrecker as was involved in the accident, showing the condition after it was repaired and repainted. We do not stipulate that the color of the vehicle, after it was repainted, was the same as it was before the accident. The overall general appearance; in other words, the size and width and all that, has not been altered, [72] the heighth of the cab, and all that, I think is the same. The general appearance of the wrecker is the same in those pictures as it was before the accident. With reference to the question of color, that is a question of proof. We do not stipulate that shows the correct color before the accident. That is a question of proof.

Mr. Hanson: I understand it will be necessary for us to put on proof to show that the color in those photographs, A, B, and C, was the same as before the accident.

Mr. Wright: If that is your contention, it will be necessary to put on proof.

The Court: Gentlemen, I clip these exhibits together in relation to the various groups. We will handle them that way and keep them together and save some time. Now will you gentlemen stipulate that during all the discussion the jury has been present in the jury box?

Mr. Wright: So stipulated.

The Court: The record will show all of counsel also present. Gentlemen, you may proceed.

MRS. JENNIE DUFF

being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Wright): What is your name, please? A. Jennie Duff. [73]

Q. Are you the wife of Mr. John A. Duff, who is in the court? A. Yes.

Q. Where do you live, Mrs. Duff?

A. Burley, Idaho.

Q. And what is your age? A. Sixty-one.

Q. At the time of the accident, how old were you? A. Sixty.

Q. You and Mr. Duff have been married how long?

A. Between 20 and 21 years. I do not remember the exact date.

Q. Do you have any children? A. One.

Q. How long have you lived in Burley, Idaho?

A. In Burley we have only lived about three years.

Q. Now calling your attention to December 31 of 1954, did you and your husband start on a trip?

A. May I make a correction on that date? We lived in Burley three years, but we lived five miles from Burley longer than that; in that vicinity.

Q. On December 31, 1954, did you start on a trip? A. Yes sir.

Q. About what time was it that you started?

(Testimony of Mrs. Jennie Duff.)

A. About six, somewhere around six in the morning.

Q. Would that be Pacific time or Mountain time? A. Mountain time. [74]

Q. So that would be one hour faster than Elko time or Pacific time. Now who started with you?

A. My husband and my sister.

Q. And your sister's name?

A. Elizabeth Bronson.

Q. Is that the Elizabeth Bronson who is in court here? A. Yes.

Q. In whose automobile?

A. My husband's.

Q. Was that a 1955 DeSoto sedan automobile?

A. Yes.

Q. Four door? A. Yes.

Q. And you started from Burley, Idaho?

A. Yes.

Q. Just briefly tell us generally your destination.

A. We were going to my sister's home at Vallejo and her son's home at Santa Rosa for a vacation, and also my brother and sister-in-law at Santa Rosa.

Q. You and your husband were going on a vacation trip? A. Yes sir.

Q. And your sister was riding with you?

A. That's right; she was going to her home.

Q. And your plans, you were going to go from Burley through what main towns?

(Testimony of Mrs. Jennie Duff.)

A. Well, Twin Falls and Wells and Elko. Shall I name all the [75] towns?

Q. Then on West. When you started out, how were you seated?

A. The three of us in the front. I was sitting in the middle.

Q. And I take it Mr. Duff was driving?

A. Yes.

Q. And Elizabeth Bronson on your right, all in the front seat? A. Yes.

Q. Now did you stay that way all the way up to the time the accident occurred, or was there a change? A. No.

Q. Where was the change, about?

A. Near the Idaho-Nevada line, close to the Nevada line.

Q. Somewhere near what they call Contact or Rox, some place like that? A. Yes.

Q. What change was made there?

A. Well, I felt sleepy so I just went over the seat, the back seat, took a pillow and covered myself up.

Q. When you started out, was the highway full of snow, when you left Burley?

A. It was raining in Burley that night. As I remember, before I got over, there was snow along the side of the road.

Q. Before you got into the back seat?

A. Yes sir.

Q. Up to the time that you got in the back seat,

(Testimony of Mrs. Jennie Duff.)

will you tell [76] us about your husband's driving, please?

A. Well, I consider my husband a good driver. He didn't drive very fast and kept on his own side of the road.

Q. Did he get off the road at all up to the time you got——

Mr. Pike: Objected to as too remote.

The Court: It may stand.

Q. You got in the back seat to go to sleep, you say? A. Yes.

Q. Then I take it you laid down? A. Yes.

Q. Did you go to sleep? A. Yes sir.

Q. You say you had a couple of blankets?

A. Yes sir.

Q. Were they over you? A. Yes sir.

Q. How far did you remain lying down, or do you remember when you woke up where you were? In other words, tell us where you were when you started to wake up, if you did, or what the situation was.

A. Well, it seems like I began to wake up a little — I sensed there was something wrong — it seemed not exactly wrong, but I heard my sister say, "It looks like something in the barrow pit". I did hear that. I had awakened enough, but I thought, "Oh, well, probably not anything", and I just went to sleep again. [77]

Q. Were you still lying down?

A. Yes sir.

(Testimony of Mrs. Jennie Duff.)

Q. And you didn't get up and sit up then?

A. No sir.

Q. Then what next did you know? What happened, do you know, from your own observation, or where did you come to, or what place?

A. Well, the next I knew I was lying on the bottom of the car; that is, my head and shoulders were on top and the rest of my body was in the body of the car.

Q. When you were lying down, was your head toward the driver's side or towards the other side?

The Court: Mrs. Duff, would you like to have a few moments before you continue your testimony?

A. I'll try.

Mr. Wright: Do you mind if I ask some leading questions?

Mr. Pike: Go ahead.

Q. Well, briefly, Mrs. Duff, I take it you found out there had been an accident in the car?

A. Yes.

Q. And you were taken by ambulance to the Elko County General Hospital? A. Yes.

Q. And then you stayed in the Elko County General Hospital about [78] how long?

A. Three weeks.

Q. And then you went by air ambulance to your home, did you not? A. Yes.

Q. Then when you came to in the car, you found yourself with your head toward the door on the driver's side? A. Yes sir.

(Testimony of Mrs. Jennie Duff.)

Q. And you were down into the bottom part of the rear seat? A. Yes.

Q. And then were you moved from your car into another car before the ambulance came?

A. Well, I tried to get up. I couldn't and the door seemed to fly open and I fell out backwards and some one caught me as I fell and I heard a man's voice and then there was more than one—I couldn't see because my head was cut so bad, bleeding, and then they packed me and put me in another car and then I was unconscious again.

Q. I want to try to shorten it and not go into too much detail. Did you have periods where you came to and then you blacked out?

A. Yes sir.

Q. Then do you remember going to the hospital in the ambulance? A. No sir.

Q. Do you remember when you came to, were you in the hospital in bed?

A. I came to—I can remember when they were sewing my head.

Q. That was the next thing? [79]

A. Yes.

Q. That would be the doctors were sewing your head. Then did you have periods where you lapsed and came back for some time? A. Yes.

Q. Do you have any idea yourself how long that period of lapsing and coming to lasted, over how many days?

(Testimony of Mrs. Jennie Duff.)

A. Oh, several days. I don't remember, but it was several days.

Q. Then I suppose—let's go up to see when you came to fairly good, so that you had pretty good periods of knowing where you were—what did you notice about those?

A. Well, they had me on a bed that went up with my head down and feet down from my hips was down and my head was down and it was up in the middle, and then they had a traction up over me in my chest, going up and over, with the weight on to hold my chest up.

Q. You found out that your chest had been fractured? A. Had been crushed.

Q. And they were pulling your chest upward with the weights? A. Yes sir.

Q. Did you have any difficulty with breathing when you saw that condition?

A. Not as much after they had pulled this up, I could breath very good then.

Q. Pulled your chest up? [80]

A. Yes.

Q. What kind of an apparatus did they put on your chest to pull your chest upward?

A. They had wires in here, made a line in it and they put a hook through it and then there was a cord or rod or something that went up and over my bed.

Q. Then did you find out if you had any pains in your chest from any fractured ribs?

(Testimony of Mrs. Jennie Duff.)

A. Yes sir, I had pains through my chest and I had a lot of pain in my back.

Q. In your back on which side, with reference to the ribs, on what side?

A. Well, I couldn't turn——

Q. Where was the pain? You talk about your ribs in back and on which side of the body, your right or left in back?

A. I was lying on my right side and I couldn't turn over on my left side and I asked the doctor why. It seemed so I couldn't turn over. It was because I had broken ribs on that side.

Q. That would be in the left rear portion that you had some fractured ribs? A. Yes.

Q. Now with reference to your back itself, the middle of the bed was higher than your feet and head, is that correct? A. That is right.

Q. Did you notice anything about your back?

A. I noticed my back hurt, but I didn't know it was broken. I knew it was hurt.

Q. And then how about any pains in your head?

A. Yes, I had pains.

Q. Describe that as to the severity of the pains, when you were still in the hospital at Elko.

A. I pained all over, but I think they kept me under sedatives and I didn't realize it. It hurt me all over. I didn't realize it until I got better.

Q. After you got better, you say you started realizing you had some pains?

A. Yes.

(Testimony of Mrs. Jennie Duff.)

Q. How about your head? Did you have any headaches while you were still in the hospital?

A. Yes.

Q. Where were the pains in your head? Describe them.

A. This eye mostly.

Q. You are pointing to your left eye. That is here for the record.

A. My left eye, in my eye and through my head.

Q. You are pointing to the left side of your head?

A. Yes sir.

Q. What did you notice there?

A. That is where the most severe pain was.

Q. Was that on the outside or inside? [82]

A. Of my head?

Q. Yes.

A. It was all through it.

Q. Inside of your head as well as out?

A. Yes sir.

Q. Did you have pain on the top of your head on the left side while in the hospital?

A. I had pain along here, the left side, going back here and around back this way.

Q. That would be pointing on the right side and up towards the crown of the head, is that correct?

A. Yes.

Q. How about the middle part of your head, did you feel any pain?

A. Yes.

Q. When you left the hospital at Elko, did you walk or go out by stretcher, or how?

A. When I left the hospital, I walked with some one helping me. I had my son and husband help.

(Testimony of Mrs. Jennie Duff.)

Q. Supporting you on each side. Now you went in an automobile, I take it, from there to the Elko airport? A. Yes.

Q. And by air ambulance to Burley?

A. Yes.

Q. And then when you got to Burley, I take it, you probably went by car to your home, is that correct? [83] A. That is right.

Q. Now at home did you go to the hospital or did you stay at home in Burley?

A. I stayed at home.

Q. And did you have any x-rays taken?

A. Yes sir.

Q. Who was your doctor in Burley?

A. Dr. Trehune.

Q. Dr. Charles Trehune? A. Yes sir.

Q. How long did you stay under the care of Dr. Trehune, or are you still under his care?

A. I am still under his care.

Q. When you left the Elko hospital, did you have any cast on? A. Yes sir.

Q. Describe that, what kind of a cast and where it was.

A. It came from my head, so my neck couldn't move and I held my head back that way.

Q. It was pushing your head backwards?

A. Yes, way back.

Q. Then how far down?

A. And down past my hips.

(Testimony of Mrs. Jennie Duff.)

Q. So your entire body, then, from the hips up to your head?

A. Not my arms, my entire body.

Q. Was encased in a cast? [84]

A. That's right.

Q. How long did you keep that cast on that you described; in other words, the full cast, together with the thing that held your head back? How long did you keep it on in the position of pushing your head backwards? A. Six months.

Q. So that would be some time in June of 1955?

A. I think I looked it up. I kept a diary and I think it was the 27th of June that it was taken off.

Q. So you had your head pushed up backwards until about June 27, 1955? A. Yes.

Q. Then did you have any further types of casts or braces put on?

A. Yes, they took the cast off and put a brace on that still held my head up this way, but not so far back as the cast did.

Q. Now where did you go to get that brace?

A. I went to Boise.

Q. Do you remember the name of the doctors there in Boise? A. I have forgotten it.

Q. While you had that cast on your back and your head pushed backwards, were you able to eat?

A. While I had the cast on?

Q. If you were able to, describe how you did.

A. Well, I ate standing up.

Q. You were not able to sit down during that six months to eat? [85] A. No.

(Testimony of Mrs. Jennie Duff.)

Q. How about when you tried to sit down?

A. When I sit down the cast would come up so far I couldn't move my jaw. I couldn't make it work when I was sitting down and when I was standing up, I had to lean forward on something, like this, so my jaw could work.

Q. What did you notice with reference to going to sleep at night? Was there any discomfort at all?

A. Yes sir. I had to sleep in my cast. It was very uncomfortable.

Q. And at first when you went home at Burley, were you up part of the time or up all the time, or what was the situation?

A. I was in bed most of the time at first. I would say the first three months I was in bed most of the time.

Q. When you had the cast on, could you sleep on your sides or just on your back?

A. While I had the cast on, I could sleep on one side, my right side. I couldn't turn over because these ribs still hurt me to lay on the other side.

Q. That would be on your left side, was it?

A. Yes.

Q. Before the cast was taken off, did you notice any pain about your chest?

A. Well, other than I felt smothering at times. I don't know if that was my chest. [86]

Q. After the cast was removed about June 27th, how was your chest by that time?

A. After my cast was removed—I didn't understand that.

(Testimony of Mrs. Jennie Duff.)

Q. Well, the cast was taken off about June 27, 1955?

A. Yes sir.

Q. How was the middle of your chest and front of your chest at that time?

A. I don't know about my chest, but I had such a pain in my back it came right through upon my ribs and right through me. Whether it was caused by the chest or whether from my back, but it came right through.

Q. What was the severity of that cast?

A. Well, it would make me nauseated, it would hurt so bad.

Q. Would that pain come and go or were you free of pain part of the time?

A. It would seem if I could lie on my back, for instance, all night, then I wouldn't have much pain in the morning. You are talking about after I had the cast removed?

Q. Yes, after you had the cast removed and had the back brace.

A. But when I got up and around, the pain would start.

Q. And while you had your back brace on, were you able to sleep on either side?

A. No sir. I still had to lie over on my back.

Q. At the present time?

A. Yes sir.

Q. And if you lie on either side, what do you notice? [87]

A. It pains me and it smothers me.

Q. When you first got your back brace—do you still wear that?

(Testimony of Mrs. Jennie Duff.)

A. I still wear the back brace but not the neck piece. I took that off about a month ago.

Q. Do you take the back brace off part of the time? A. To sleep.

Q. With reference to this part that held your chin up, you don't wear that now? You haven't got that part on?

A. No sir, I don't wear that now.

Q. When was that part taken off that held your head back?

A. Oh, more than a month ago. When I came down to the deposition I had it off about two weeks.

Q. The depositions were taken September 19, 1955, so about two weeks before that?

A. Yes.

Q. Have you got your cast on now?

A. Yes sir.

Q. Could you stand up and just point out about where it comes up and where it goes?

A. Well, it comes from my hips around here and up here. It held my back straight.

Q. And that is the top? A. Yes.

Q. And that is pointing up to a point just a little above the shoulder, is it not? [88]

A. Yes sir.

Q. And that goes down to the hips?

A. The hips.

Q. Are there straps going around you to hold you firmly? A. Yes sir.

Q. But no metal brace or anything in front?

A. No.

(Testimony of Mrs. Jennie Duff.)

Q. Do you have any pain at the present time?

A. Yes sir.

Q. And tell us about that. Where do you notice pain?

A. I have had a lot of pain in my neck. It still hurts me to turn my head too far.

Q. Now you are pointing, for the sake of the record, to the right?

A. Yes sir. I can turn it a little farther to the left without hurting me.

Q. And when you move it up and down, tell us about that.

A. It doesn't hurt me so much to move up and down.

Q. Now with reference to your back, do you notice any pain?

A. Yes sir, I still have severe pains in my back.

Q. Are you free of pain at any time during the day?

A. Yes sir.

Q. What times of the day?

A. As I say, when this pain gets real bad, I lie down. The doctor told me to try to leave the brace off as much as I [89] could, but it hurts worse when my brace is off, so I will leave it off once in a while, but as long as I can lie on my back—I mean, when it gets to hurting, I lie down or I go put my brace on and it doesn't hurt so bad.

Q. You say you still have to sleep on your back?

A. Yes sir.

Q. And as you are up and around the house

(Testimony of Mrs. Jennie Duff.)

during the day time, does your back then start bothering at times? A. Yes sir.

Q. Tell us about any eye conditions?

A. Oh, my eye pains me a lot.

Q. Which eye is that?

A. That is my left eye.

Q. What have you noticed about your left eye?

A. I don't see as well with it and it hurts me so to read, gets red and things blur with it when I read.

Q. Did you have any cuts on the eyelid?

A. I had something on the eyelid, I don't know what it was, but anyway it would swell and then break and then it would swell and break for about three months.

Q. That was three months from the time of the accident? A. Yes sir, after I got home.

Q. Did you go to somebody to be treated for that? A. Yes sir.

Q. Who was that? [90]

A. Well, that was an eye doctor in a way; he was an M. D. that had studied about eyes.

Q. What was his name?

A. Dr. Enmore.

Q. In Burley? A. No, Ruppert.

Q. That is a nearby town?

A. Yes sir, ten miles.

Q. Then do you have a scar on you from a cut?

A. On my eye?

Q. Well, or somewhere—yes, your eyelid?

(Testimony of Mrs. Jennie Duff.)

A. My eyelid has a scar on it from this thing that kept swelling and breaking.

Q. On your forehead is there any condition?

A. Yes, there is a cut about over here clear over in here.

Q. Let me, for the sake of the record, describe that if I may and see if I describe it correctly. A cut on your right forehead approximately about the right side of it.

A. If I had a looking glass—somewhere along in here.

Q. For the sake of the record, it starts at a point about the right eye and I would say approximately about three-quarters of the way towards the outside. Is that about correct? Then it goes almost directly across the forehead up more towards the left eye and zigzags.

A. And there is a cut in here too. [91]

Q. That is just about the left eyebrow, a little to the back of the left brow, edge of the left eyebrow. I think that is more or less generally. The doctor can describe it better.

Mr. Wright: I assume neither you or Mrs. Duff have any objections to members of the jury looking closely at Mrs. Duff's forehead. They might be interested in looking. I know Mrs. Duff does not like to be peered at at close range, but members of the jury would you like to see these scars just referred to.

The Court: We are about to recess, Mrs. Duff.

Before we do, you might walk down before the jury.

Jury admonished and recess taken at 11:00 a.m.

11:15 a.m.

Presence of the jury stipulated.

Dr. Clarke sworn and testified.

MRS. DUFF

resumed the witness stand on further

Direct Examination

Q. (By Mr. Wright): Mrs. Duff, I think I was about the point with reference to this cast, and if the Court please, I would like to have this photograph marked for identification.

The Court: The photograph may be marked plaintiffs' Exhibit 14.

Q. Mrs. Duff, I show you plaintiffs' Exhibit 14 for identification—I will not go into details—but do you——

Mr. Pike: May I suggest you ask first when and where [92] the picture was taken?

Q. When was this picture taken?

A. We had the picture taken in July, but it laid in the camera until August—I mean the latter part of June—and just had it left in the camera before I had it developed.

Q. Was this taken when you still had the body cast on? A. Yes sir.

Q. So it would be some time before June 27, 1955? A. Yes sir.

(Testimony of Mrs. Jennie Duff.)

Q. Would it be in the month of June?

A. Yes sir.

Q. Does this photograph show you in the cast?

A. Yes, and my niece.

Mr. Wright: At this time I would like to introduce this in evidence for the purpose of showing this particular cast.

Mr. Pike: May I ask a couple of questions?

Q. (By Mr. Wright): That picture was taken at Burley?

A. Yes sir, in front of our house.

Q. (By Mr. Pike): Who took the picture?

A. My niece's husband, Mr. Gray.

Q. Approximately how long after that was the cast removed? A. It wasn't too long.

Q. Within a week after the picture was taken?

A. Oh, not that soon. Probably two or three weeks before.

Q. When you talk about the brace, you still had the brace you [93] wore on your back?

A. Yes sir.

Q. But when you are talking about the cast, you are talking about the portion which held your neck up?

A. My cast was all in one piece, sir, but my brace is in two pieces, but my cast was in one piece.

Q. Then I understand that this was your cast?

A. That was my cast. It was all one piece, that held my head up and went straight down, one piece.

Q. So I won't get confused on that—after the neck portion of your cast was removed, were you

(Testimony of Mrs. Jennie Duff.)

thereafter given a neck brace? A. Yes sir.

Q. And did you wear that neck brace up until about the first of September, from June to September? A. Yes.

Q. And you no longer wear it, is that correct?

A. That's right.

Mr. Pike: No objection.

The Court: You have offered that in evidence?

Mr. Wright: Yes.

The Court: The picture will be admitted under the same number as identification, No. 14.

Mr. Wright: If the Court please, before I pass it, may I ask a couple of questions to clarify it?

Q. In the photograph you were to the right of your niece and [94] looking at the picture would be this way. Now there is something white below the lady's chin. What is that below your chin?

A. It is my cast. The white shows my cast.

Q. That is the cast?

A. Yes, and this black spot on there, they had to saw out that, I couldn't breathe. I could breathe, but I couldn't talk, it pressed in on me here and so they cut a hole around here to give me room, so I could talk and it shows up black.

Mr. Wright: May I pass this to the jury?

(Exhibit 14 passed to the jury.)

Q. Mrs. Duff, at the present time I think you spoke of a numbness after the accident of your forehead and into the scalp? A. Yes sir.

Q. Now tell us about that condition, if that has improved or what is the situation today?

(Testimony of Mrs. Jennie Duff.)

A. The numbness goes back, as I say, right like this, to about here, to the middle.

Q. Let us try to describe that for the record.

A. That is numb now.

Q. Does the numbness start at the edge of each of the scars, or approximate edge?

A. Right across the scar.

Q. And about the right side of your forehead where the numbness is, does it go over that far?

A. Yes sir. [95]

Q. And then it goes backward to the top of your head. Does it go back to what you might call the crown of the head, does it go back that far?

A. Yes.

Q. Can you feel anything in that area?

A. No sir.

Q. Does that cause you any discomfort?

A. I don't suppose that does, but I have an awful headache. I don't know whether that has anything to do with it or whether it is my eye that causes the headache, or what does, but it is around this eye, and as I say, it zigzags here and around this side.

Q. Now at the present time do you have any headaches at all? A. Yes sir.

Q. Tell us about how frequent or infrequent, or whether that is a steady condition. In other words, we want to know what the condition is.

A. I have headaches real often and it seems I will feel quite free for a little while and all at once

(Testimony of Mrs. Jennie Duff.)

it will start coming and it will help it to lapse if I can lie down and go to sleep.

Q. How about your condition of your nervousness, or anything of that type? What is the situation at the present time?

A. It affected my nerves.

Q. Now before the accident occurred, you were living in Burley, is that correct? [96]

A. Yes sir.

Q. And you folks have your own home?

A. Yes sir.

Q. And do you hire any work in your home?

A. We had a lady come in to do the work.

Q. Before the accident?

A. After the accident. I had no help before.

Q. You did your own housework before the accident? A. Yes sir.

Q. How about your laundry before the accident, did you send that out?

A. No sir, I always did my own laundry.

Q. What was the condition of your health before the accident? A. I had good health.

Q. And what was the condition of your ability to remember? A. Well, I had a good memory.

Q. Since the accident have you had any trouble?

A. Yes, I have not been able to remember like I did before.

Q. Now after the accident, you have had to have help, is that right? A. Yes sir.

Q. Your husband can more or less testify to that, can't he? A. Yes.

(Testimony of Mrs. Jennie Duff.)

Q. With reference to your household duties at the present time, do you do your laundry? [97]

A. No sir.

Q. You send all that out? A. Yes sir.

Q. How about ironing?

A. I can't iron. It hurts.

Q. It hurts you where?

A. My back. It is my back that hurts.

Q. How about sweeping?

A. I can't sweep either.

Q. And tell us why you can't do that?

A. Because it hurts my back.

Q. And then do you do the cooking?

A. I do most of my cooking, yes.

Q. Can you lift, say a pot of water, like you did before? A. No sir.

Q. And what do you notice about that?

A. Well, it hurts me to lift. I can pull things, I pull instead of lifting.

Q. How about washing and wiping dishes?

A. Well, my husband still helps me with it.

Q. Before the accident, did you do your own dishes? A. Yes sir.

Q. Mr. Duff took care of paying the doctor bills and different nurses, etc? A. Yes sir. [98]

Q. He can testify about that, can't he?

A. Yes sir.

Q. With reference to the lady helping you, he can testify about that too? A. Yes sir.

Mr. Wright: I believe that is all.

(Testimony of Mrs. Jennie Duff.)

Cross Examination

Q. (By Mr. Pike): Mrs. Duff, generally about the woman coming in to help with the ironing, she comes in about every couple of weeks, doesn't she?

A. About the ironing, I have most of it down at the laundry. She comes in once in a while to do maybe a few pieces that the laundry hasn't finished for me, or maybe she will take something and wash it out for me that I can't send to the laundry. She irons most of it.

Q. Does Mrs. Gordon still come in to help?

A. Yes sir.

Q. And she probably comes in say every two weeks?

A. Just once in a while, when I think my house is too dirty, I have her come in and clean it up.

Q. Is there any one else comes in besides Mrs. Gordon?

A. No sir, just my son and my husband, just the three of us.

Q. That has been true generally since you got out of your cast? A. Yes sir.

Q. And your son is now 18 and he lives at home with you and Mr. [99] Duff? A. Yes sir.

Q. You were in the Elko hospital for about three weeks and two or three days before you left the Elko hospital, you were able to get up and walk around, were you not?

A. Yes sir, but mostly some one helped me. What I mean, I just couldn't run around by myself. I had to have help.

(Testimony of Mrs. Jennie Duff.)

Q. So when you left there, that was about say the 21st, three weeks after the 31st of December, 1954? A. Yes sir.

Q. You were able to walk? A. Yes sir.

Q. Since then is it true that you haven't been in any hospital at all, except to go to the hospital at Burley to have X-rays taken, or possibly to have the cast removed, or something of that sort?

A. Yes.

Q. In other words, you have not been a patient in the hospital? A. That is true.

Q. And you have made some trips to see the doctor in Burley about your condition, is that correct?

A. Yes sir, he has been treating me.

Q. Now after you had the cast removed, or the neck portion, you were given a neck brace of the type you sometimes see people wearing, with a leather lining, holding their chin up? [100]

A. Sir, I didn't have the cast removed part at a time.

Q. The whole thing was taken off and then part replaced on a back and neck brace at the same time? A. At the same time.

Q. After wearing the neck brace, we will say, from about June until about the first of September, you were able to dispense with that?

A. The neck brace, yes sir.

Q. And since then you have worn the back brace? A. Yes.

Q. Now generally has the doctor advised you to

(Testimony of Mrs. Jennie Duff.)

discontinue wearing that as your condition improves, not all at once, of course, but gradually dispense with wearing the back brace?

A. About the time I was here for the deposition, just before that, I seen Dr. Drehune and he said he thought my back was strong enough that I could try leaving it off, but if it hurt me keep it on, but he said if I wanted to try to leave it off, he thought it might make my back stronger.

Q. Have you been taking your brace off when you go to bed at night for your usual night's rest?

A. Yes sir.

Q. And you commenced leaving it off during your night sleeping hours before September of this year, did you not? A. Yes sir.

Q. And you have been able to get along without continuous since [101] at night? A. Yes sir.

Q. Now generally, Mrs. Duff, you get your night's rest over a period of about eight hours, about eight hours in bed? A. Or nine.

Q. Generally eight or nine?

A. Sometimes ten if I feel tired.

Q. Then the rest of the time you are up and about the house dressed, is that true?

A. I dress, yes.

Q. Has that generally been true since, oh say before September of this year?

A. It is. That has been true since I had the back brace on.

Q. And as to your neck condition, do you feel that you now are able to move your head without

(Testimony of Mrs. Jennie Duff.)

any particular discomfort? I notice while you are there, you are at least able to look from left to right.

A. It doesn't hurt me to move up and down, but it hurts to move too far to the left or right. I can move it some.

Q. But generally if you don't force your head around when you look, you are able to do that without discomfort?

A. If I don't turn my head too far. If I turn too far, it hurts.

Q. If you look at that edge of the jury box and over at the bailiff's desk, you are able to do that without discomfort, aren't [102] you?

Mr. Pike: That is all.

Redirect Examination

Q. (By Mr. Wright): What was your weight before the accident?

A. My weight was 124-125.

Q. What do you weigh now?

A. I weigh 105. I weighed 108 at the deposition, but Dr. Collette weighed me the other day and I weighed 105.

Mr. Wright: That's all.

Jury admonished and recess taken at 12:00 noon.

Afternoon Session—November 8, 1954

2:00 p.m.

Dr. Harry B. Gilbert sworn and testified.

Wednesday, November 9, 1954—10:00 a.m.

Presence of the jury stipulated.

The Court: Which one of you gentlemen wish to read into the record the stipulation made in chambers?

Mr. Wright: I can do it, if the Court please. We should probably put up the highway map on the board to call to the attention of the jurors the different points.

Members of the jury, both plaintiffs' attorneys and the attorneys for the defense have stipulated as to the map in connection with this action, so I will give you what the map more or less shows, in other words, the stipulated facts. This is an engineer's drawing of a plane of the portion of the [103] highway in the area where the accident happened. Now there is designated a piece of chrome metal at highway station—there are highway station marks at different places; in other words, there is a certain station and identical one there to find these numbers and you can figure up the number of feet at any time by taking 24600 and then take the next station, which is 1247 and which would mean 1247 feet and that would represent—in other words, would be 25847 feet where the chrome is from this guide post, and the metal chrome we have stipulated that is where the accident occurred, and Mr. Settlemyer has stipulated for his deposition and has brought this down to the plane part of the line marked "WS", in other words, W. Settlemyer, and that would come down on this point on the bottom, which would be the same place, and then going to the east generally—north is to the top of the map—would be the same way on the highway, and east would be

back toward Elko. Generally the highway runs east and west. There are changes as you go along, but call it generally east and west, so north toward the top and back towards Wells would be east and towards Elko is west.

Now indicated up under here is a guide post and it is indicated on this other graph cut and guide post. Now this shows a 3.34 per cent grade. That means in every 100 feet, going from east to the west, when you pass over the crown of the hill, it drops down 3.34 feet for every 100 feet traveled. In other words, you travel 100 feet as you go over the crest, but [104] down the hill you will drop 3.34 feet in every 100 feet.

Now you will notice the scale is one inch equals one hundred feet. The engineers in the State Highway Department, in making their planes will show the curvature by scale of one foot equals 10 inches. One inch equals 100 feet on the horizontal, and this second plane shows a vertical, where one inch equals ten feet. Now in order to correct that, because you have two maps with different scales, the engineers have also drawn a map showing the highway the same at the top and with the vertical above it, with the curvature at the same scale as the horizontal and the grade of 3.34 per cent.

Now it has been stipulated that the highway where the chrome was found, the width of it there is—this was measured by William Settlemyer, the engineer—and starting on the north side of the highway, in other words, where the chrome is, start-

ing at the north edge of the road, there was three and one-half feet of gravelly shoulder running north and south, with some pavement mixed up, then there is four feet of what appears to be a shoulder. That would be a black-top shoulder, and there was $14\frac{1}{2}$ feet of hard pavement; in other words, $14\frac{1}{2}$ feet from the center of the north side would be asphalt pavement, then there would be four feet black-top shoulder, then three and one-half feet of gravelly shoulder, from the center going northward.

Now from the center line going south from the chrome, you have on the south side of the center line 13 feet of hard [105] pavement and 8 feet of shoulder, making that total width of 43 feet; in other words, a total width from the outside shoulder on the north to the outside shoulder on the south is the distance of 43 feet. The distance from the center line to the north edge of the shoulder would be 22 feet. In other words, on the north side, where the chrome is, from the center line, from there to the outside shoulder is 22 feet; from the center line to the outside of the shoulder on the south is a distance of 21 feet and 13 feet armoured pavement and 8 feet being shoulder, it would be about the same composition of the other; that is, tar is spilled over and the gravel would be about the same. That armoured part south of the center line to the edge of the armoured part is 13 feet. Then there is black top shoulder $6\frac{1}{2}$ feet and then $2\frac{1}{2}$ feet of gravel and black stuff mixed together.

Juror: May we have the engineer's report?

Mr. Wright: I guess there would be no objection to typing up that much.

Mr. Pike: I can see no objection to that. The testimony of Mr. William Settlemeier contains questions and answers. As far as we are concerned, that portion referred to has been typed. Part of it is on page 8.

Mr. Wright: So stipulated, that we type it up and notice it as an exhibit and used as testimony of W. L. Settlemeier.

Now we have some pictures and we will stipulate the pictures and I suppose we should maybe hold them up first and [106] then pass them to the jurors. Would that be agreeable to the Court?

Mr. Pike: Each one say what it is and what it represents.

Mr. Wright: Coming from Wells, Nevada and going west, the first picture that is taken is plaintiffs' Exhibit No. 9, was taken on March 31, 1955 and the road construction, it is stipulated, has not changed from the time of the accident and the time the picture was taken, but as to weather conditions on the highway, that is a question of proof. The first picture was taken 6/10 of a mile east of where the chrome was found, looking toward the west; and you can see the crown of the hill and the other pictures you can see more detail. That is 6/10 of a mile east of the chrome, looking west, and the camera was set by a person sitting in the automobile and the camera setting on the highway and the camera lies exactly in front. I was sitting in the automo-

bile and the camera setting here and is exactly in front.

The next picture, as you come closer, is $4/10$ of a mile——

Mr. Pike: Wouldn't it be all right that we can make a notation on Plaintiffs' Exhibit 9, for example, that it was taken $6/10$ of a mile east of the chrome on the highway and then we won't have to have any part of Mr. Fox's testimony.

Mr. Wright: All right, $6/10$ of a mile east of the chrome looking westward. [107]

The next picture, Exhibit 10, is taken $4/10$ of a mile, measured by the speedometer of the automobile, plus 60 feet from the chrome, east of the chrome on the highway. This is Plaintiffs' Exhibit 10, shows the same highway, but going farther westward toward the crown of the hill, and the camera was set looking westward and the carton that is on the highway there is $4/10$ of a mile plus 60 feet east of where the chrome was, looking westward.

Mr. Pike: If I understand that, the carton seen on the highway is $4/10$ of a mile east of where the chrome was and the camera was set up 60 feet east of the carton.

Mr. Wright: Yes. May we have that marked, camera setting $4/10$ of a mile plus 60 feet east of the chrome, looking westward.

Now the next one is Exhibit No. 11—these were all taken on the same day and within a few minutes, in all pictures the camera setting at that same angle

—it is taken at this paper carton $4/10$ of a mile east of the chrome, looking westward.

Mr. Pike: In other words, it is $4/10$ of a mile from that first car you see.

Mr. Wright: Notice the car which is somewhat in the west-bound lane. That is where the piece of chrome was found point of impact. Now it is stipulated, not undertaken to be the same position of the car on the highway, only to identify [108] where the chrome was off the shoulder. This picture is taken $4/10$ of a mile eastward of where the chrome was, looking westward down the highway, again the camera setting right up. It is stipulated the picture was taken $4/10$ of a mile east of the chrome, looking westward.

Now this next picture was taken $3\frac{1}{2}/10$ miles east, looking westward, the same date, March 31, 1955, camera pointed westward. The car was in the same position as before, opposite the camera, and it is $3\frac{1}{2}/10$ mile. Now it is stipulated that we may write on the back that this picture, No. 12, was taken $3\frac{1}{2}/10$ miles east of the chrome, looking westward.

Mr. Pike: Three and one-half tenths is, of course, .35 of a mile, $35/100$ of a mile, east of the chrome on the highway. In this last picture, is there some object there?

Mr. Wright: The same automobile, in the same place.

Mr. Pike: This is taken substantially 264 feet closer than Plaintiffs' Exhibit 11.

The Court: Now in simple language we have

four pictures here, one being taken approximately the crest of the hill, looking west toward the scene of the accident; the second picture closer to the scene; the third closer yet and the fourth closer. Are these pictures in sequence in distance—closer, closer, closer.

Mr. Wright: That is right. Now we have some [109] more photos of Mr. Duff's De Soto. These pictures were taken by a large camera in the Page garage and following the accident and approximately on January 4, 1955. It is stipulated that the flash photo is not in color and that the color of it is not shown by the flash camera, and also that details of the damage can be seen, but more detail can not be shown.

Mr. Pike: In other words, we agree that these three photographs Mr. Wright is exhibiting to the jury now, do represent the Page tow car, taken inside the garage, but they do not fully show the color and do not show the full extent of the damage.

Mr. Wright: This happens to be the De Soto automobile. The same stipulation applies to both of them. The first one shows the De Soto after the accident, the right side of the car. Now No. 2 is the picture taken by flash camera in the Page garage after the accident of the Duff car and shows the front end. The next picture, 3, shows the plaintiffs' car after the accident.

Now to conserve a little time, we are going to show you four photographs of the defendant's truck following the accident. These were taken the

same day as the Duff car, January 4, 1955, in the Page garage, same camera and with flashlight and the same stipulation applies, that it shows, as far as visible, the physical damage and what it shows as to color, that is subject to objection. It is only black and white and doesn't show. [110]

Mr. Pike: We are not stipulating it shows all the damage.

Mr. Wright: No, but as much detail as could be shown in these particular pictures.

Mr. Pike: That is right.

Mr. Wright: This series of pictures, Exhibits Nos. 4, 5, 6, and 7—one picture is more or less duplicate of No. 6 and 4 is more or less duplicate, all left front, and No. 6 towards the rear.

There are three pictures, which are defendant's Exhibits Nos. A, B, and C. They were taken some time later, after the truck, Page wrecker truck, had been repaired and repainted. It was taken at Wells, Nevada, approximately opposite the Page garage.

Mr. Hanson: That paint was the same paint as originally.

Mr. Wright: They could not paint with the same paint.

Mr. Hanson: Well, same color.

Mr. Wright: It think that is subject to proof. We will not stipulate that.

Mr. Pike: In other words, we contend that the photographs correctly depict the appearance of the Page truck prior to the accident.

Mr. Wright: That is your contention. At any

rate, it does show that it is repaired. The same stipulation, the [111] picture does not show the color, that is subject to proof, because it is a black and white camera, and this was repainted after the accident, repaired and fully repainted, before the picture was taken.

Mr. Pike: I don't know whether it was fully repainted or not; it was painted with fresh paint, at least in part. We will have testimony.

Mr. Wright: This next picture shows the U-Haul trailer that was involved in the wreck, and it was taken outside the Page garage January 4, 1955. The color is subject to proof, because it is black and white and does not show the color. Flash camera.

I call attention of the Court that the map that has been placed on the board, No. 13, and by stipulation we have, and did offer it in evidence as part of the record in this case.

Mr. Pike: No objection.

The Court: The map is already admitted.

Dr. Hugh S. Collette sworn and testified.

Jury admonished and recess taken at 12:05.

November 9, 1954—Afternoon Session

1:30 P.M.

Presence of the jury stipulated.

Joe Mendive sworn and testified. (See transcript attached page 361.)

EARL REMINGTON

a witness on behalf of the plaintiff being duly sworn, testified as follows: [112]

Direct Examination

Q. (By Mr. Wright): Your name is Earl Remington? A. Yes sir.

Q. And you live where? A. Salt Lake City.

Q. And your address please?

A. 748 E. South Temple.

Q. You work for the Interstate Motor Lines?

A. Yes sir.

Q. How long have you worked for Interstate?

A. Five and one-half years.

Q. And in that capacity, employed by the Interstate Motor Lines, which operates a large motor service, semi-trailers, have you had occasion to go over U. S. 40 from Salt Lake City to Elko?

A. Many times.

Q. And on December 31, 1954, were you in an Interstate Motor truck? A. Yes sir.

Q. And you were going where?

A. East, between Wells and Elko.

Q. From Elko to Wells, going east?

A. From Elko to Wells.

Q. Who was driving from Elko, Nevada, east?

A. I was.

Q. Were you accompanied by any one? [113]

A. Neal Seacrest.

Q. Is that one of those sleepers, where these drivers of them sleep and you change driving every so often? A. Yes sir.

(Testimony of Earl Remington.)

Q. And was Neal asleep during that period from Elko on about to 14 miles west of Wells, Nevada? A. No.

Q. Now what was the condition of the road as you left Elko and as you approached Wells?

A. Snowstorm in Elko and as we approached farther east we went, the snowstorm lessened out. The road was awfully icy.

Q. Did you come to a point about 14 miles west of Wells, Nevada? A. Yes sir.

Q. Did you see anything which attracted your attention?

A. Well, as we got to the ridge—I didn't know at the time—saw something and the closer I got to it I recognized it as the wrecker trying to pull some one off the road back on the road.

Mr. Hanson: I think the witness should answer for himself, not the man with him.

A. I am sorry, sir.

The Court: Well, I think the members of the jury are familiar with the fact we often say "we" when we mean "I." This witness speaks for himself.

Q. Can you identify what wrecker truck you saw? [114] A. Yes sir.

Q. And had you ever seen it before?

A. Oh yes.

Q. And had that same wrecker, on one occasion, helped you out of some difficulty?

A. It had.

Q. And you knew it quite well?

(Testimony of Earl Remington.)

A. Yes sir.

Q. Had you passed through Wells, Nevada, many times on that road?

A. Three and four times a week.

Q. Whose wrecker was it?

A. Page garage wrecker, Wells, Nevada.

Q. As you approached it, what speed were you going?

A. We were travelling about 20 to 25 miles an hour.

Q. On your right-hand side?

A. On my own side, travelling east.

Q. As you approached the wrecker, did you see any car, either coming down the hill or somewhere in the vicinity?

A. Automobile headed west. I slowed so he could go around the front end of the wrecker before I proceeded in my own lane of traffic east.

Q. Do I understand this automobile passed the wrecker before you passed the wrecker?

A. Yes.

Q. In doing so, the automobile went on which side of the road? [115]

A. South lane of traffic coming east, on east-west road.

Q. Did you see, as you approached the wrecker, anybody around the wrecker?

A. Oh, I saw a couple of fellows behind and one man standing in front of the wrecker, flagging traffic.

Q. Can you recognize the fellow?

(Testimony of Earl Remington.)

A. Mr. Page, the owner of the wrecker.

Q. Do you recognize him here?

A. Sitting at the table.

Mr. Wright: He is pointing to Mr. Page in the court room, for the sake of the record.

A. Yes sir.

Q. What speed did you go by the wrecker?

A. Oh, about 20 miles an hour.

Q. How close did you pass by the wrecker?

A. Oh, I would judge within three or four feet of the front end of the wrecker.

Q. Did you look at the wrecker as you approached and went by? A. Yes, sir.

Q. Tell us what, if you noticed, as to any lights or anything burning on the wrecker?

A. As far as I recall, there were no lights whatsoever appearing on the wrecker.

Q. And you are familiar with the fact that the wrecker had a dome light? [116] A. Yes sir.

Q. Did you see that flash on and off?

A. Not that I recall.

Q. Where was the front end of the wrecker?

A. Sitting approximately in the south lane.

Q. Where was the wrecker standing, which direction?

A. Standing about northwest direction, back to the shoulder of the highway.

Q. Was there anything to the north of the highway itself, down in the barrow pit?

A. A black Ford automobile, pulling a 2-wheel trailer.

(Testimony of Earl Remington.)

Q. What distance separated, if any did, the rear of the wrecker and the north edge of the shoulder?

A. Oh, I would judge somewhere in the neighborhood of four and six feet.

Q. And then what was the condition of the road itself, the covering, if any, leading up to the wrecker?

A. It had between a quarter and half inch of ice and you could see the highway through the ice.

Q. And as you passed the wrecker, what was the condition of the road there, the covering?

A. From there to the top of the crest of the hill, where we finally stopped the truck, it was still icy and after the top of the hill, the ice lessened out, was not so much.

Q. As you passed the wrecker, did you see any cars coming [117] over the summit, or coming down that stretch to the wrecker?

A. When I got about half way between the wrecker and the curve of the hill, a car came over the crest of the hill.

Q. Did you later identify that as belonging to certain people? A. Yes sir.

Q. Who were the people?

A. I later found out it belonged to Mr. Duff.

Q. You say you were about how far up the hill when you saw him coming over the crest?

A. About half-way.

(Testimony of Earl Remington.)

Q. Then tell us what you did and what the automobile approaching did.

A. Knowing the west-bound lane of traffic was blocked by the wrecker, I knew the condition of the road, I tried to signal Mr. Duff to let him know the road was blocked, by turning on the headlights of my truck.

Q. How many times did you do that?

A. Twice.

Q. And then did you proceed up the hill?

A. Yes sir.

Q. And did Mr. Duff pass you?

A. Yes, he did.

Q. In other words, two automobiles had passed without any accident? A. Yes. [118]

Q. Is the Interstate Motor truck equipped with a rear view mirror?

A. Each side of the driver.

Q. How big?

A. About six inches wide and 18 inches high.

Q. In other words, an unusually big rear view mirror? A. Yes sir.

Q. Can you see, by looking into the rear view mirror, a car to the rear?

A. You bet you can.

Q. How soon can you pick it up as it goes by?

A. You can pick up a car within two feet of the back end of the trailer, clear on for a quarter of a mile.

Q. After the De Soto car went by, tell us what, if anything, you did as to looking?

(Testimony of Earl Remington.)

A. I watched the rear going down hill.

Q. Where did you pick it up in the rear view mirror?

A. Just as he passed the back end of the trailer.

Q. Did you notice, as to the rear end, as to whether or not there was anything that attracted your attention to the rear end?

A. Stop lights.

Q. Was that his brake lights? A. Yes sir.

Q. How far down the hill did you keep the De Soto car in your [119] rear view mirror when it passed you, when you picked it up in the mirror? How far did you notice it?

A. I noticed it until the impact of the accident.

Q. Tell us how far you saw that red light up to the time of the impact.

A. As far as I know, the spot lights of the De Soto car was on from the time he passed me until he hit into the car and he went in a straight line down the north side of the road to about 100 feet of the wrecker, went into sort of a side spin and broadside, hitting the wrecker; would be the left side of the wrecker.

Q. Which side of the automobile?

A. The left side.

Q. During this time was your Interstate Motor Line truck proceeding up the hill?

A. Yes sir.

Q. Then did you stop, or what did you do?

A. As soon as I got up on the hill, where we

(Testimony of Earl Remington.)

could stop safely without the truck sliding and rolling backwards, I stopped, my driver and I got out and went back to the highway.

Q. You stopped on the highway?

A. The shoulder, put our clearance lights on and signal that flashes on the front fender and back of the truck, left it there to go back to the scene of the accident.

Q. When you got up on top, did you go up over the crest? [120] A. Yes.

Q. And then you say you walked back, went back to the scene of the accident? A. Yes.

Q. Did you go down the highway itself or down the shoulder?

A. We walked on the north shoulder of the highway.

Q. So you would have to cross the highway?

A. Yes.

Q. When you stopped on top, did you observe the condition of the highway, the covering or lack of covering, and if so what?

A. Well, the icy covering up there was very slick.

Q. How far eastward did that extend?

A. At that time I didn't know, I hadn't been to it.

Q. You were where, with reference to the crest?

A. Right on the crest.

Q. Then you went down the highway on the north shoulder? A. Yes sir.

(Testimony of Earl Remington.)

Q. As you crossed over the highway, what did you observe as to covering?

A. Very slick. We could hardly stand up on it.

Q. Now did you get anything to put on your feet?

A. Put my overshoes on.

Q. You went down to the scene, did you?

A. Yes sir.

Q. And the wrecker, where was that? [121]

A. The wrecker had been knocked a little bit, the back end, around to the southwest and was still over toward the middle of the highway and Mr. Duff——

(Conference at the bench.)

The Court: Ladies and gentlemen of the jury, you will realize it is difficult for counsel to remember all that is being said and you may have observed from time one of the counsel has requested the reporter to note a certain place in her notes, which means that later this particular counsel will wish to have your attention directed toward that so he may review it and perhaps mention it in his summary. I want to point out that by virtue of that device, you are to give no particular importance or attention to that particular question and answer of the particular witness. Is that satisfactory, gentlemen?

Mr. Pike: That is all right.

Q. Did you look at the highway to see whether or not the wrecker had been moved any distance west?

A. No, I couldn't see as to that.

(Testimony of Earl Remington.)

Q. You didn't make an examination of that detail?
A. No sir.

Q. Did you see Mr. Duff around the cars?

A. Yes sir.

Q. What was he doing? [122]

A. He was wandering around in a very dazed condition.

Q. And the two women?

A. The two women, yes, had been in Mr. Duff's car and had been removed from Mr. Duff's car and placed in the car already on the parking.

Q. Did you recognize the Page tow car?

A. Yes.

Q. What happened to the Page wrecker?

A. When it was knocked around there, part of the tow automobile was up underneath the back end of the wrecker. A bunch of fellows there, they were pushing up to get that tow automobile from underneath the wrecker and Mr. Page got in the wrecker shortly after that and proceeded to take it into Wells.

Q. A woman went with him?

A. A woman and a little child.

Q. About what time was it that you pulled around that Page wrecker?

A. Somewhere in the neighborhood of 10 A.M., in the morning.

Q. Around what time did you leave?

A. About 11:20.

Q. And then you proceeded on into Wells?

A. Into Salt Lake City.

(Testimony of Earl Remington.)

Q. With your Interstate Motor? A. Yes.

Q. And did Mr. Seacrest go along with you?

A. Yes sir.

Q. As you got back up into your vehicle, your big Interstate Motor vehicle truck, and you proceeded towards the east, describe the condition of the road as to covering.

A. Down the road a little the icy condition of the road was lessened and finally completely good open and damp highway into Wells.

Q. About where was the damp you stated with reference to the crest?

A. I would say between one eighty and quarter of a mile from the crest of the hill.

Q. And then on into Wells?

A. It tapered. If I remember correctly, the Wells highway was dry.

Q. As you approached the wrecker, what was the condition of the appearance of the highway, as to the color?

A. It would be sort of a white color, but ice on the highway would make it appear like this, white.

Q. And up to where the Page wrecker was standing? A. Yes.

Q. You say you have seen the Page wrecker many times? A. Yes sir.

Q. When you saw it in Wells, where would you usually see it?

A. Sitting right in front of Mr. Page's garage or across the street. [124]

Q. Right in town? A. Yes sir.

(Testimony of Earl Remington.)

Q. Can you tell us then about the color? What was the color?

A. A white top and body blue, the bottom.

Q. And you say it was a blue bottom?

A. Yes sir.

Q. Have you seen that same wrecker since it has been repaired? A. Yes sir.

Q. If I showed you pictures of it, would you recognize the truck? A. I would.

Q. Since the time you have seen it repaired, where have you seen it?

A. Sitting in the same spot, by Mr. Page's garage.

Q. Is there any difference in the color since the repairs than there was the day of the accident?

A. It is a much brighter blue bottom on it now than it used to have before he painted it.

Q. I show you plaintiffs' Exhibit 7 and ask you if you can identify that?

A. Yes sir, that is Mr. Page's wrecker.

Q. Is that the same wrecker you saw?

A. Same wrecker I saw on the highway.

Q. Was it damaged like that?

A. That was after the impact, the accident.

Q. Now this picture, can you identify this? This is defendant's [125] Exhibit A.

A. Yes sir, that is Mr. Page's wrecker since it was painted and sits in front of his garage now.

Q. Tell us what difference, if any, between Plaintiffs' Exhibit 7, the wrecker on December 31,

(Testimony of Earl Remington.)

1954, as the bottom color shows afterward when it was repaired?

A. It has a much darker blue bottom after repaired than it was before.

Q. And before, as you approached it that day, how did it appear?

A. More or less it blended in with the scenery of the highway.

Mr. Wright: I move that be stricken as conclusion.

The Court: It may be stricken.

Q. Just describe the appearance it gave you as you approached as to color, not what it did.

A. What do you mean?

Q. What color it gave you as you approached, the appearance it gave you, not the fact it blended in with anything.

Mr. Pike: That is objected to as leading and also repetitious. He told us what color.

The Court: I think the question has been answered. He said white, with the body blue. Objection sustained.

Mr. Wright: That's all. [126]

Cross Examination

Q. (By Mr. Hanson): Mr. Remington, you said you approached the scene of the accident from the east going west? A. Yes.

Q. How far were you when you first saw the wrecked cars on the north side of the highway?

(Testimony of Earl Remington.)

A. Oh, you could see that bright color for a quarter of a mile, or that trailer.

Q. The U-Haul trailer? A. Yes sir.

Q. Bright yellow? A. Bright orange.

Q. What color was the car that hit the trailer?

A. It was black.

Q. Dark black? A. Yes sir.

Q. You saw that very clearly?

A. Yes sir.

Q. You could see it three-quarters of a mile?

A. Yes.

Q. When you stopped your truck at the top of the hill to the east of the scene of the accident, could you see the car and the trailer, the wrecker, down there? A. Yes sir.

Q. Could you see without trouble or difficulty of any kind? [127]

A. Yes sir, we were looking for it.

Q. Now, Mr. Remington, counsel asked you when you pulled out around the wrecker, going east and before the impact between the Duff car and the wrecker, did you have to pull out around that wrecker or stay in your own lane of traffic?

A. My own lane on the south shoulder of the highway.

Q. At that point where this accident happened, you told us there was ice on the highway?

A. Yes sir.

Q. And you could see through the ice to the hard surface underneath?

A. Yes sir. Quite black ice.

(Testimony of Earl Remington.)

Q. You applied your brakes? A. Yes sir.

Q. Because you could see the black highway?

A. Yes.

Q. At that particular spot you had a black highway? A. Yes sir.

Q. And what you see on top of the wrecker would show up on that black?

A. Unless it is blended in with the scenery and sagebrush on the side of the highway.

Q. And the white top of the wrecker would show on the black ice, we can agree on that?

A. Yes sir. [128]

Q. And would you tell us about where the front end of that wrecker was with reference to the center line of the highway?

A. The front end of the wrecker was setting approximately at the center line.

Q. A little bit to the north of the center line, four or five feet?

A. Three or four inches, not feet.

Q. Did you distinctly make that observation when you went by? A. Yes sir.

Q. You are sure it was not more than three or four inches? A. Yes sir.

Q. How wide would you say the distance was between the front end of the wrecker and what would be the south edge of the highway?

A. The highway is 12 feet wide and six to eight feet shoulder, so there would be 12—20, 21.

Q. Room for two cars to pass?

(Testimony of Earl Remington.)

A. If you got out on the shoulder of the road, yes sir.

Q. The shoulder is black top?

A. Yes, gravel with oil spread over the top.

Q. Hard there, isn't it?

A. Semi-hard surface.

Q. Now you say when you got half way up the hill going to the east, you saw this car coming over the tip of the hill, traveling west? [129]

A. Yes.

Q. Did you form any opinion how fast the car was going at that time? A. I did.

Q. How fast was it going?

A. Between 40 and 45 miles per hour.

Q. You are sure you don't think between 45 and 50? A. No sir.

Q. You have testified at the other hearing involved in this accident? A. I have.

Q. And you remember testifying in Elko as follows, page 170 of the transcript, starting with line 10, you are being asked these questions under oath at that time:

“Q. Tell what you observed as to his speed. Did you form any estimate of his speed?

“A. Well, a man coming up the hill as I was, and a man coming, approaching over the hill, I would figure he was coming a pretty fair rate of speed; he was probably traveling, oh, I imagine forty-five to fifty miles an hour, something in that neighborhood.”

(Testimony of Earl Remington.)

You so testified at that time? A. Yes sir.

Q. Was that the speed according to your estimate? A. Yes sir. [130]

Q. You remember at the time you saw this car you were on an icy hill? A. Yes sir.

Q. You knew at that time that the car was traveling too fast for those conditions?

A. For those conditions at that particular spot, yes sir.

Q. It was traveling too fast when it came over that hill on the ice? A. Yes.

Q. That is the reason you blinked your lights, because it was going too fast to go around the wrecker?

A. I blinked my lights to avoid an accident.

Q. You knew he was going too fast to control the car and go around the wrecker?

A. That I wouldn't say.

Q. In fact you told Mr. Page, after the accident, when you walked down to the scene, the reason you blinked your lights was because that man was traveling too fast for the road conditions?

A. That is right.

Q. And that is just your opinion?

A. Yes, just my opinion at the time, 45 to 50 miles was too fast for the existing condition.

Mr. Hanson: That is all. [131]

Redirect Examination

Q. (By Mr. Wright): Now, Mr. Remington, before you arrived at the crest of the hill, did you

(Testimony of Earl Remington.)

know what was over the crest of the hill?

A. No sir.

Q. Now after you got the vehicle stopped and got up over the crest of the hill to Wells, how was the condition? Tell us what the customary speed would be over the hill.

Mr. Hanson: Objected to as having no bearing.

Mr. Wright: Probably not sufficient foundation.

The Court: I am going to sustain the objection. I do not see where it is relevant.

Mr. Wright: It is this, if the Court please, a person is going along and that is what we want to bring out, on top of the other side.

The Court: What do you mean, other side?

Mr. Wright: East of the crest.

The Court: What this witness's customary speed and a person should maintain going over that crossing—objection sustained.

Q. Now you made the statement when he was going up the hill that he was going too fast for the then existing road conditions. When you formed that opinion, you were going up the hill?

A. Yes sir.

Q. And had you known at that time what the condition was over [132] the crest of the hill?

A. No.

Q. Mr. Remington, from the time you passed around by the wrecker, the Page wrecker, were there any cars between the wrecker—in other words, between the wrecker up to the time you saw the Duff

(Testimony of Earl Remington.)

car, were there any other cars in that area?

A. No sir, not that I recall.

Mr. Wright: That's all.

Recross Examination

Q. (By Mr. Hanson): You have driven this western country for many many years, have you not? A. Twenty or thirty years, yes sir.

Q. You know when you get into a cut or go over a hill where the sun hasn't hit, you are going to reach slippery spots, if it is that time in winter?

A. Sometimes, yes.

Q. Of course, you can't see over the top of the hill—you come to the top, you have to expect you might run into that condition?

Mr. Wright: No objection if you will let me ask questions about the top of the hill, but we do object if he is going to ask questions on one side of the hill and on the other. It is calling for opinion and conclusion of the witness, unless he lets me go into it.

The Court: If this is an objection, it will [133] be sustained.

Mr. Wright: I will object to the question.

Mr. Hanson: I will withdraw it, your Honor.

NEAL SEACREST

a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Wright): Your name is Neal Seacrest? A. Yes sir.

(Testimony of Neal Seacrest.)

Q. Where do you live?

A. Salt Lake City, 358 West 1050 North.

Q. Are you married? A. Yes.

Q. Now, Mr. Seacrest, it has been testified to here that you were working for the Interstate Motor Lines and on December 31, 1954, you were in an Interstate Motor Line truck and that you had changed at Elko, Nevada and you were proceeding eastward from Elko, Nevada, Mr. Remington was riding in addition up to that point.

A. Yes sir.

Q. Now you went on eastward, did you not?

A. Yes sir.

Q. Did you notice anything in the road when you got about 14 miles west of Wells, Nevada?

A. Yes sir, there was this car that had been off the road and [134] a wrecker there trying to pull it back on to the road.

Q. Did you see any other thing beside the car and wrecker? Was something also on the road?

A. Well, a trailer, car and also a wrecker was getting ready to pull the trailer out.

Q. Now as you approached, did you recognize the particular wrecker?

A. Well, I knew that it was from Wells, Nevada, because I saw it there.

Q. Did you recognize who it belonged to, what garage?

A. I knew it belonged to Mr. Page, but I don't know him.

(Testimony of Neal Seacrest.)

Q. And so as you approached it, what was the condition of the surface of the highway?

A. Well, it was packed down ice or snow like just after a snowstorm.

Q. What appearance did it give you as to the color going up to where the wrecker was?

A. Well, it was just like ice, I would say, packed down, gives a glaring effect, like white, like ice.

Q. That was up to where the wrecker was setting?
A. Yes.

Q. Did that substance cover the entire highway from shoulder to shoulder?
A. Yes.

Q. And the speed of the truck as it approached the wrecker, [135] please?

A. I wasn't driving, but as I recall it had slowed down, so I wouldn't be sure.

Q. Did you see any car before you arrived at the wrecker or after you arrived at the wrecker?

A. Well, there was a car passed just before we got to the wrecker.

Q. In other words, passed going from east to the west?
A. Going west.

Q. The opposite direction; and then, I presume, you kept on and arrived at the wrecker?

A. Yes.

Q. And did you go by the wrecker?

A. Yes, we slowed down. We were observing what had happened.

Q. Did you look at the wrecker as you approached it?
A. Yes.

(Testimony of Neal Seacrest.)

Q. And did you look at the wrecker truck as you went by? A. Yes.

Q. Tell us what lights, if any, you saw burning on the wrecker as you approached and went by.

A. I didn't see any lights at all.

Q. You are acquainted with the fact these wreckers have what we call a dome light on top?

A. Yes.

Q. Did you notice that burning in an on and off condition? [136]

A. I didn't see it burning.

Q. From the time you passed the wrecker, or after you passed the Page wrecker, going up that hill, what was the condition of the highway as to the covering?

A. It was awfully slick and had a small amount of water over this ice, which caused it to be slick on up the hill.

Q. Did you see any cars as you went up the hill?

A. Saw this new De Soto up half way up the hill. It came over the hill toward us.

Q. You were about half way up the hill when the De Soto came over the hill? A. Yes.

Q. Did you watch the De Soto as it came towards you over the hill and passed? A. Yes.

Q. Going in the opposite direction?

A. It was going west and we east.

(Testimony of Neal Seacrest.)

Q. Did you estimate the speed of that automobile?

A. I would estimate it around normal speed for the road.

Q. That is about 40 to 45 miles?

A. Yes sir.

Q. Then was there any impact between the Interstate truck and the 1955, or new De Soto?

A. Impact?

Q. Yes, did they come together or go by? [137]

A. Went by.

Q. As it went by what, if anything did you do? I might ask you first, where were you seated?

A. On the right-hand side. I didn't do anything.

Q. Did you look any place?

A. Well, I looked, yes.

Q. Where did you look?

A. Well, after the car went by, Mr. Remington was looking in the rear mirror on the truck. I moved over too and I could look. You just have to pull your body over right back of his to look at the mirror too.

Q. Then you could see to the rear?

A. Yes.

Q. Did you look in the mirror on the driver's side or your side?

A. On the driver's side, left side.

Q. What did you see as you looked in the mirror to the rear of the left?

A. We saw the new De Soto when we looked in the mirror, after it had gone by.

(Testimony of Neal Seacrest.)

Q. Go ahead and tell us what you saw, about where you picked it up in the rear view mirror, what you observed and observed the De Soto do?

A. I guess it was about along toward the back of the trailer by the time I leaned over to see it. I saw it by the spot light going on, I wouldn't know when. They were on when I looked. [138]

Q. Tell us about how far you watched the De Soto in the rear mirror.

A. Until it got clear down to the wrecker. The wrecker went into a slide with this other wreck.

Q. How about that red spot light, how long did that stay on? What was the situation?

A. It stayed on all the way down when I saw it and at the wreck.

Q. Now tell us, if you can, which way the head of the car, the front of the De Soto car, was when it started the sliding towards the north or south?

A. It was towards the north, on the right-hand side of the road.

Q. Can you describe the manner of its sliding down the road?

A. Just turned the car over, turned to the right clear around.

Q. Can you give us an estimate about how far it appeared, from your position, to slide down before it struck the wreck?

A. Oh, I would say 100 feet down before it struck the wreck, or a little less.

Q. And then the Interstate Motor Line truck,

(Testimony of Neal Seacrest.)

did it stop or go on some distance, and if so, where did it stop?

A. We went on to the top of the hill, couldn't stop on the hill because of the hill, and found a handy place to park and Mr. Remington and I walked back.

Q. You stopped on the paved or shoulder portion? [139]

A. The shoulder of the road.

Q. Did you go down on the same or cross over?

A. We went down the shoulder along where the wreck was.

Q. As I take it, when you got to the wreck from the west, going east, then the wreck itself, the collision between the De Soto and the wrecker, had not yet occurred, is that right, when you went up to the wrecker?

A. No, not when we went back to the wrecker, no.

Q. Can you tell us the U-Haul trailer, when you saw it, was it on its wheels or tipped over on one side?

A. It was on its wheels at that time.

Q. Where was the front of the wrecker with reference to the highway, some part of the highway?

A. The front of the wrecker was headed to the north, just a little northwest.

Q. We call the highway running generally east and west; in other words, you were going east and to your left would be the north.

A. Yes, it was headed about 45 degree angle off the shoulder of the road.

(Testimony of Neal Seacrest.)

Q. The front end was pointed towards the center or towards the north?

A. The trailer of the car?

Q. No, the wrecker.

A. You said trailer. [140]

Q. I mean the Page wrecker.

A. The front end of the wrecker was over on the center line.

Q. Was it parallel with the road, at an angle or crosswise? Tell us about that.

A. About 45 degree angle toward the north from the center of the road.

Q. In other words, the front would be pointing somewhat towards Wells? A. Yes.

Q. And the back towards Elko, but at an angle?

A. Yes, at an angle.

Q. About how long did you stay around where the accident occurred?

A. I believe it was an hour and a half.

Q. Had the Page wrecker left by the time you walked back there, or still there?

A. No, still there.

Q. Did you see the Page wrecker leave?

A. Yes.

Q. And between the time that you got back—when you arrived back to where the cars were, did you find out one fellow's name was Duff?

A. Yes. Well, I am not sure whether we found out there or later. We found out later or read it in the paper.

Q. Did you see some fellow who appeared to be

(Testimony of Neal Seacrest.)

in the accident? [141] A. Oh yes.

Q. Was it the driver of that De Soto car?

A. Yes.

Q. What was he doing when you arrived at the scene?

A. He was just wandering around, seemed dazed, didn't know what had happened.

Q. Did you hear him make any statement?

A. No.

Q. About what time did you and Earl Remington go back to your truck? How long after this impact?

A. Well, about an hour, just a little over an hour we were there.

Q. When you got in the truck and proceeded on eastward, I guess you went on into Wells?

A. Yes.

Q. Who drove, you or Earl? A. Earl.

Q. What was the condition of the road as you went over the crest?

Mr. Hanson: Objected to as incompetent, irrelevant, and immaterial.

Mr. Wright: I think not.

Mr. Hanson: You mean 14 miles to Wells?

The Court: He may answer as to what it was going over the crest and immediately beyond it.

A. Over the crest of the road it was thawing, no ice on the hill. Apparently it had dried off. [142]

Q. As you went on eastward, that was the condition? A. Yes.

(Testimony of Neal Seacrest.)

Q. I might ask you about this wrecker as you approached it—can you tell us about the color?

A. Light color on top and somewhat of a dark color on the bottom.

Q. And can you tell us the dark color, as to color or appearance of that?

Mr. Hanson: Objected to. It is answered.

A. Dark on the bottom. I wouldn't guarantee what color it was; dark color.

Mr. Wright: That's all.

Cross Examination

Q. (By Mr. Hanson): Mr. Seacrest, how long would you say it was from the time the accident happened until you got headed on your way into Wells?

A. It was some time. We had to make up logs and I remember we made it out for an hour and a half overall time. Probably not actually over an hour and 20 minutes.

Q. In other words, would have been an hour and twenty minutes?

A. That was counting walking back and back again.

Q. During that time it had been thawing, I suppose?

A. Yes.

Q. So this part of the highway just over the crest was wet when you went to Elko, was probably icy at the time of the accident, [143] wasn't it?

A. Very likely.

Q. When this car passed you, you say that you

(Testimony of Neal Seacrest.)

observed the brake lights of the car as it went past your truck?

A. It took me a certain length of time to lean over. Mr. Remington was driving. I knew something might happen, so I leaned over and looked and the lights were on.

Q. Where was the car when you observed those lights, with reference to the rear end of your truck?

A. Back towards the back of the truck, I would say.

Q. Were both of you on an icy stretch of road at that time? A. Yes sir.

Q. You say this car passed you when you were about half way up the hill? A. Yes.

Q. Could you be mistaken about that?

A. Well, I more or less just completely forgot about the accident because I wasn't driving and they hadn't called me for anything, so I forgot it and then I was in Elko one day, they called me out of bed, had an hour's sleep, and said what is this and that and later I rechecked, I came up there the other day and I found out I had taken the wrong distances for the car at the time.

Q. Do you want to change your testimony and say one time you testified the car passed you when on the crest and now you say [144] you change your mind about that?

A. Well, yes, because a certain spot where I remember passing the car was different when actually passing around the hill. We went on up a ways.

Q. On page 144, beginning with line 7, you testi-

(Testimony of Neal Seacrest.)

fied at the hearing in Elko on this matter in April, 1955? A. Yes.

Q. Will you read this with me, page 144, beginning with line 7, and you were asked this question: "All right, let me get that portion so that we will be clear on it. You got to the top of the hill, just as you got to the top of the hill you noticed the other car coming over? A. We were approaching it.

Q. The crest of the hill? A. Yes." Did you so testify under oath at that time?

A. Well, I said I rechecked later and I said I was approaching the hill.

Q. Did you say you reached the crest of the hill about the same time, as I read?

A. As I say, I checked later and didn't reach it at the same time; more or less half way up the hill.

Q. In other words, you want to change your testimony you gave in Elko because what you observed later, you were going over this part of the highway under different conditions?

A. Well, I can see where we passed it on the hill and I rechecked and see where I was wrong.

Q. Wherever you were on the hill, the car passed you and just as it got to the rear end of your car, you saw the brake lights go on?

The Court: He said he had to lean over and saw the lights already on.

Q. I beg your pardon. When you leaned over and looked into the rear view mirror, you saw the brake lights of the car on when it was in the rear of your truck? A. I said approximately.

(Testimony of Neal Seacrest.)

Q. And then you continued to where the accident occurred and you estimated it started to go out of control about 100 feet of the wrecker?

A. That is what I estimated.

Q. You made that estimate when you were looking in the rear view mirror? A. Yes.

Q. Those brake lights being on, did you form an opinion the car was braking all the time going down hill?

A. I presume it was trying to slow down; have to slow down real slow on the ice. The lights were on.

Q. In other words, he was applying his brakes?

A. Yes, the lights were on.

Q. Did they stay on all the time until, say the time of the Page wrecker?

A. As far as I could see, they were. [146]

Q. Now when this car passed you, did Mr. Remington say to you, "That fellow is driving too fast for the road conditions"?

Mr. Wright: I object to that on the ground it is irrelevant and hearsay.

(Question read.)

Mr. Wright: Calling for opinion and conclusion and also hearsay. No showing the defendant was present. Irrelevant.

The Court: Objection sustained.

Q. Now, Mr. Seacrest, you say at the place the wrecker was, that part of the highway, it was icy at that point? A. Very icy.

(Testimony of Neal Seacrest.)

Q. Was there water on top of the ice at that point? A. Water, yes.

Q. You truckers have a term that you use, where there is ice over the hard surface of the highway, where you can see through the ice—you call that black ice? A. Yes.

Q. Would it be fair to describe that area around that wrecker showing a condition of black ice?

A. Well, we call a lot black ice where actually it really isn't black.

Q. What would you call it, sir?

A. Well, we call it black ice, yes.

Q. Was it black ice at that place?

A. It was black up the hill. It was still packed on snow [147] under here.

Q. Black around the wrecker, that part of the highway? A. Not too black.

Q. Was it black at all?

A. Black towards the hill, not around the wrecker.

Q. You had been driving this truck just before you got to Elko? A. I drove it to Elko, yes.

Q. How many hours had you driven it?

A. Well, it took us about seven hours, six hours and 45 minutes.

Q. When you got to Elko it was your turn to sleep in the sleeper you had in the back of the cab there? A. Yes.

Q. And Mr. Remington took over?

A. Yes.

Q. As you approached the scene of this accident,

(Testimony of Neal Seacrest.)

where you say you crossed over on the north side of the highway, you had no difficulty getting past the wrecker? A. No.

Q. Did you make any observations as to where the front of the tow car, wrecker, was with respect to the center line of the highway?

A. It was very close.

Q. As you went past there, apparently everything seemed to be in control, as far as the people were concerned?

A. No, it was awfully slick. [148]

Q. Did you observe the trailer was off the road?

A. Yes.

Q. Do you recall what color it was?

A. I believe it was orange, or sort of orange color.

Q. How about the car, did you make any observation of the color of the car?

A. Dark color, but I wouldn't be sure.

Q. Were you sleepy at the time you went past, after driving seven hours?

A. No, I wasn't.

Q. You didn't pay too much attention to the scene. You could see things were under control and you went on up the hill?

A. We always look to see if we can help. You have a habit of stopping when anything happens.

Q. It was apparent to you at that time your help was not needed, and you proceeded on?

A. That's right.

Q. Can you give us any estimate as to how far

(Testimony of Neal Seacrest.)

you could see, so far as atmospheric conditions were concerned, on that day?

A. I believe you could see as far as you can almost any time. It was fairly cloudy. You could see quite a ways.

Q. The atmosphere was clear? A. Yes.

Q. In other words, you had no difficulty in seeing this car the first time, the terrain permitted you to see it, this car [149] that was off the road?

A. Oh yes, after we got over the rise.

Q. And when you got to the top of the hill, you could see all the way back to where the accident happened?

A. Couldn't see the car but could see something was there. Wouldn't say I could see a car but could see some trouble on the road.

Q. Do you have any estimate as to how far it was from the top of the hill, where you stopped your truck, back to where the accident happened?

A. I estimated it I believe 5/10 of a mile, or about half a mile, but I checked it later from where we were parked and it was 4/10 of a mile.

Redirect Examination

Q. (By Mr. Wright): You say that at the time you estimated it was a half mile. You say then you checked—how did you check it?

A. I drive over there every other day and we have a tachometer attached to the speedometer and anywhere you want to check you look at it and it shows at all times.

(Testimony of Neal Seacrest.)

Q. Looking at that tachometer, does that register the difference between two different places?

A. You would have to look at the mileage and tenths are in a certain place and read it.

Q. By reading it you can tell?

A. Yes. [150]

Q. Is it accurate? A. Yes, you bet.

Q. You say it is accurate? A. Yes sir.

Q. And did you check when you came from the east going west, did you estimate the distance that you could see where something would be on the highway, and as you came over the crest, how far it was where you could see that place?

A. Well, I believe you could see it for half a mile.

Q. Did you check then on the tachometer?

A. Yes, that is how I estimated.

Q. How much was your reading on that?

A. Four-tenths on the tachometer.

Q. Actually by test four-tenths?

A. Four tenths.

Q. I think counsel asked you when you went up the hill, the condition over the crest, whether that was icy. As you went up the hill, could you see over the crest? A. No.

Q. As you went up the hill, up to the point where you parked, what was the condition of the road?

A. It was very slick, still fairly icy.

Mr. Wright: I believe that is all.

(Witness excused.)

Jury admonished and 15-minute recess taken at 2:55 p.m. [151]

3:10 P.M.

Presence of the jury stipulated.

W. L. Bellinger sworn and testified. (Transcript attached at back. See page 350.)

Mr. Wright: If the Court please, we have taken up with counsel and we have stipulated, in connection with evidence of plaintiffs' witnesses, that we are not yet closing, but in order to permit certain witnesses to take the stand, so it wouldn't inconvenience them, that the defendant may call them out of order as their witnesses and without prejudice to any rights in connection with any motions they may desire to make.

Mr. Hanson: Thank you very much. I appreciate it very much and I am sure they do.

ROBERT SHAW

a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hanson): Tell us your name, please, sir? A. Robert Shaw.

Q. Where do you live, Mr. Shaw?

A. Provo, Utah.

Q. What is your occupation at the present time?

A. I am a student at Brigham Young University.

Q. Located in Provo? A. Yes.

(Testimony of Robert Shaw.)

Q. What are you studying in school? [152]

A. Well, education..

Q. Are you married? A. Yes.

Q. Do you have any children? A. One.

Q. Directing your attention to December 31, 1954, at a point about 14 miles west of Wells, Nevada, just before about nine o'clock in the morning, or maybe a little earlier, were you driving your automobile? A. Yes.

Q. What kind of an automobile was that?

A. '53 Ford.

Q. Was any one with you at that time?

A. Yes.

Q. Who was?

A. My wife and my son and my brother-in-law.

Q. How old was your child at that time?

A. Eight months.

Q. And your brother-in-law's name?

A. Donald Clark.

Q. Where is he at the present time?

A. Idaho.

Q. What had been the origin of your trip before you got to that point on Highway 40? Where did you come from? A. California. [153]

Q. Had you stayed in Elko that night?

A. No.

Q. You had driven right through from where?

A. Yuba City, California.

Q. And Clark and your wife were in the car and your baby? A. Yes.

Q. Did you have a trailer attached to that car?

(Testimony of Robert Shaw.)

A. Yes.

Q. What, if anything, did you have in that trailer? A. Everything I owned.

Q. You were going away to school at Provo?

A. Yes.

Q. You had an U-Haul trailer? A. Yes.

Q. When you got about 14 miles west of Wells, tell us, in your own words, what happened.

A. Well, the road was icy and going real slow and the wind was blowing quite hard and blew the trailer this way a little. We skidded off the road and ended up facing back the way we came.

Q. Does the highway at that point go approximately east and west? A. I believe so.

Q. You were going approximately east at the time you skidded off the road?

A. I think so. [154]

Q. Did you skid to the north side of the road?

A. Yes.

Q. So your car and trailer would be sort of facing in a northwest direction? A. Yes.

Q. The trailer was still attached to it?

A. Yes.

Q. What was the position of your trailer after your car came to a stop after it skidded off the road?

A. The road was sloped off like this and the car was down like this. The trailer was up on one wheel.

Q. Which side of the trailer was it laying on at that time? A. Right side.

(Testimony of Robert Shaw.)

Q. What did you do after that happened?

A. Well, there was snow on the road and we couldn't get the car out so when a car stopped and offered to call some help, we said all right, and the car was going towards Elko. We didn't know at the time it was farther to Elko than it was to Wells and later a man came along and said we should have sent for help the other way and then he called Wells for the wrecker.

Q. And did Mr. Page come out to the scene in his wrecker? A. Yes.

Q. Do you recall about the time he got there to the scene? A. I think about 9:30.

Q. And then tell us what he did after he arrived, and what you did. [155]

A. Well, we discussed what the best method was to pull the car out of the ditch and proceeded accordingly.

Q. Tell us what he did when you proceeded accordingly.

A. He backed the wrecker up on the side of the road, hooked on to the trailer, and that is about all the further we got.

Q. Had the trailer been righted on its wheels?

A. Yes.

Q. What was the position of the tow truck or wrecker after the trailer had been righted on its wheels, with reference to the highway? What direction was it facing?

A. Well, with reference to the highway, well, the back of the truck was probably pointed in a

(Testimony of Robert Shaw.)

northwest direction, not exactly, but somewhat like on the board there.

Q. Calling your attention to the diagram on the board, this is the first time you have seen this?

A. Yes.

Q. Assuming this is the Ford and this is the trailer and this is the wrecker, how does that check with your idea?

A. That is about like it was; maybe the wrecker was pointed more north than that, the rear end.

Q. You would say that was fairly close to the way the vehicles were just before the impact occurred with the De Soto automobile? A. Yes.

Q. What were you doing when that impact occurred? [156]

A. I was running when the impact occurred.

Q. Just tell us where you were with reference to these cars when you first got the idea you had to start running?

A. Well, we had unhooked the trailer and I was standing directly between the car and the trailer.

Q. That would be about where my pencil is here? A. Yes.

Q. What, if anything, gave you any notice, if you did get notice, of this impending collision of the wrecker and the De Soto?

A. I thought I heard somebody holler and I wasn't sure just exactly what my first idea was.

Q. Were you struck by any part of the vehicle or hit or anything like that?

A. No, I was not.

(Testimony of Robert Shaw.)

Q. Which way did you run, this direction here?

A. Yes.

Q. I pointed toward the west, at a hill generally west away from the vehicle, was that it?

A. Yes.

Q. When this wrecker arrived at the scene, did you make any observation whether or not there were any lights on the wrecker?

A. Before it got there?

Q. No, after it got there.

A. Large blinker lights on it.

Q. Did you see that before the impact occurred between the [157] wrecker and the De Soto automobile? A. Yes.

Q. Tell us what you saw after the impact happened, as to the position of the cars, and also the De Soto automobile which had just arrived?

A. My car and trailer had been pushed down farther in the gully and the wrecker had been straightened in the road, so it was facing the same direction the road was, back was pointed west. The Duff automobile was kind of like this.

Q. Come down here and draw the Duff automobile on the diagram, about where it was. You can make a rectangle similar to the one here.

A. Well, now, the wrecker must have been like this and maybe close to this, and the Duff automobile was here.

Q. The Duff automobile facing what direction? Put a point on it like that. Put a "D" right there for Duff automobile and "P" to represent the

(Testimony of Robert Shaw.)

wrecker after the impact. Would that be about a fair representation? A. Yes.

Q. Now what did you do after this accident happened?

A. Well, I ran to the wrecker. My wife and baby were in the wrecker. I thought probably they had been hurt.

Q. Were they hurt? A. No.

Q. And did you see Mr. Duff at the scene there after you got [158] there where the wrecker was? Did you see him later? A. Yes, I saw him.

Q. Were you present when there was a conversation which took place between Mr. Duff and Mr. Page?

Mr. Wright: Objected to; this is assuming facts not in evidence yet as to any conversation.

Mr. Hanson: I will withdraw that.

Q. Did you hear a conversation between Mr. Duff and Mr. Page?

A. I don't want to say yes or no. I believe they talked.

Mr. Wright: Just a minute—he said he doesn't know.

The Court: He didn't quite say that.

Mr. Wright: Also the objection it is not responsive to the question.

The Court: All right. I will strike it. Go ahead.

A. Well, several people talked to Mr. Duff after the accident and I didn't pay any attention because I didn't think it mattered much and so I wouldn't

(Testimony of Robert Shaw.)

say I heard them have a conversation, but I would say I saw them together talking.

Q. Did you hear anything said by either while they were talking?

A. I never was sure whether I heard Mr. Duff say——

Mr. Wright: Objected to as speculative and it shows he is not sure and I don't think we should keep pressing.

Q. Did you hear the words "80 miles an hour" in that conversation? [159]

Mr. Wright: Objected to as leading and suggestive.

Q. I am asking if he heard any words at all in that conversation.

The Court: Up to this point, this witness has said several people were talking. He heard conversation and was concerned with his wife and baby and didn't pay any attention to the conversation but he made the further statement but he did hear conversation.

Mr. Wright: I make the additional objection not sufficient foundation laid, time, place, and persons present.

The Court: I think it is obvious the foundation has been laid in that regard. That is one thing I see.

Mr. Taber: Your Honor, if he isn't sure that he heard something, whether he heard or didn't hear, then he should not be permitted to testify.

(Testimony of Robert Shaw.)

The Court: I think the objection should be sustained to the question as you asked it.

Mr. Hanson: Perhaps I can clarify it this way, your Honor:

Q. Did you see Mr. Duff and Mr. Page together talking at any time while you were there?

A. Yes, I believe I did.

The Court: Now let me just point out to you, [160] Mr. Shaw, many times we have a habit of saying "I think" and "I believe", which makes it speculative, when we don't mean that at all. Now did you hear or didn't you?

Mr. Wright: I object to the question, calling for opinion and conclusion of the witness, as to whether or not they were talking.

The Court: Objection overruled. You may answer.

A. Yes.

Q. And did you hear any words of the conversation said between them, any words at all? If you did, tell us what those words were. A. No.

Mr. Taber: Your Honor, the witness made a statement a few minutes ago which I think the jury should be admonished to disregard.

The Court: Yes. Ladies and gentlemen of the jury, you may recall that a moment or two ago the figure 80 miles an hour, the expression, came in the discussion. You are admonished that you are to consider that as no part of the evidence and treat it as if it were never said.

Q. Mr. Shaw, you said that your trailer and the car were knocked further into the gulley. Can

(Testimony of Robert Shaw.)

you describe the damage to the trailer and your car, as you estimate it? [161]

A. The trailer ran into the back of the car and bent the bumper and broke the tail light and sort of shoved the back right around.

Q. Did you make any observation of the damage to the Duff automobile after it came to rest there, came to a stop? A. I did.

Q. Describe generally what the appearance of the damages was then.

A. The whole left side was badly pushed in.

Q. Did you see any damage to the steering wheel of the automobile? A. Yes.

Q. Describe the damage to that steering wheel, if you will please.

A. It looked like it bent the circle part of the steering wheel back.

Q. Will you say about how much it bent the steering wheel out of line?

A. It didn't look like he could have steered the car.

Q. Now, Mr. Shaw, I show you Exhibit No. 3, and I will ask you if you recognize that photograph as being Mr. Duff's automobile?

A. It looks like it might have been Mr. Duff's De Soto. I couldn't tell.

Q. What color was your automobile?

A. Green.

Q. Well, was it dark green or light green?

A. Light green. [162]

Q. What color was the trailer?

A. Orange.

(Testimony of Robert Shaw.)

Q. Did you make any inspection of the inside of the Duff car as to mileage on the speedometer?

A. Yes, I did look at the speedometer. It had four hundred and some miles on it.

Q. Do you recall the exact amount?

A. No.

Q. Can you tell us anything about damage to the Page wrecker?

A. Well, I don't know how to describe it. It looked like it put the wheels out of line, bent the fender. I don't know what the exact—

Q. Any damage to the boom of the Page wrecker? A. I don't recall exactly.

Mr. Hanson: I think that is all.

Cross Examination

Q. (By Mr. Wright): Now, Mr. Shaw, I take it that you were going from Elko eastward to Wells, Nevada? A. Yes.

Q. You were at least going to go through Wells, were you not? A. Yes.

Q. And the condition of the road generally from Elko up to where you started the skidding was what? A. Real icy. [163]

Q. How about the appearance of the highway as you drove along? Did it appear to be a snowy icy condition? A. No snow, ice.

Q. I mean, snow that had become ice? It wasn't ice that apparently came from the sky. It was snow and then turned into ice, something of that nature?

A. Yes.

Q. You say you were going slow? A. Yes.

(Testimony of Robert Shaw.)

Q. And I guess icy, the ice and snow you were driving on? A. Yes.

Q. And you say it was slippery? A. Yes.

Q. Was it very slippery?

A. Very slippery.

Q. And you were going up a grade, were you not? A. Yes.

Q. Where you went off, it was not at the foot, but partly up the grade? A. Yes.

Q. And you were on your right-hand side of the road going towards Wells? A. Yes.

Q. And then it started skidding going up hill?

A. The grade is very slight. [164]

Q. But you say you did skid from your right-hand side? Were you on the right-hand side of the center line when you started to skid? A. Yes.

Q. How fast were you going? A. Thirty.

Q. Had you been going any more than thirty? You think that is about it?

A. Yes, pretty close.

Q. You skidded, and you were on your own side in the right-hand lane and the front end of your car then skidded in which direction, to your left or right? A. To the left.

Q. Then it did go clear across the highway and off the north shoulder, your car?

A. Well, it skidded like this, sideways, right across the road, and turned right around.

Q. Would it be fair to say that you were going toward Wells on the right-hand side of the center, is that correct? A. Yes.

(Testimony of Robert Shaw.)

Q. Then as you came this way, you started skidding here—suppose you come down and take this little toy vehicle for illustration purposes and this merely shows you were going along in this way. Where did you end up? Describe as you go along, so it will be in the record. [165]

A. Well, maybe something like this.

Q. We are trying to describe with reference to the right-hand side, turning around, etc.; in other words, give a graphic picture with descriptive words, so it will go in the record and the jury can hear and talk in a loud voice.

The Court: Suppose you use the eraser to represent his car.

Q. Now, Mr. Shaw, use this for illustrative purposes and describe as you go along and take your time, so the court reporter can hear. Now you were going eastward from Elko, Nevada, on the right side of the highway and right of the center line. Your trailer is attached.

A. The car is pointed this way.

Q. To the east?

A. To the east. The trailer begins to swing and pull the car back of the car wheels to the right. Then the front of the car turns north like this, with the trailer swing around like this and pulled the trailer on the north side of the road, facing west again.

Q. The trailer sort of caught up with the car and went ahead of it to the east of the car and the front end pointed back towards Elko?

(Testimony of Robert Shaw.)

A. Right.

Q. And then it did skid more or less alongside-
ways the *wrecker*? A. Yes. [166]

Q. And it ended up so the Ford and trailer were
pointing this direction you have indicated on the
board? A. Yes, that's right.

Q. Now, Mr. Shaw, did you apply your brakes
when it started to skid?

A. No, I knew it wouldn't do any good.

Q. You say it was so slick it wouldn't do any
good to apply your brakes? A. Yes.

Q. After you got out, did you further test the
slipperiness by you and Mr. Clark doing a little
sliding about here? A. We ran, yes.

Q. Where was that, above where the wrecker
stopped? A. Right under.

Q. Did you fall over or go skidding down the
road on the ice? A. Well, we just skidded.

Q. Quite slippery then, I take it? A. Yes.

Q. Now with reference to this time as you saw
the wrecker come down the hill, the wrecker was
on its right side on the road, all wheels, I take it?

A. Yes.

Q. And did it come down more or less on the
shoulder or stay on the highway as it came to
where you were? Did it pull over on the shoulder
and stop? [167]

A. I don't remember.

Q. You spoke of the dome light. Do you remem-
ber when the dome light went on? A. Yes.

Q. When was that?

(Testimony of Robert Shaw.)

A. As they were getting ready to put the wrecker in position, my brother-in-law said that they should turn on the dome light. He thought of that so he hollered and they turned it on.

Q. So your brother-in-law, Mr. Clark, told these wreckers to turn on their dome light?

A. Yes.

Q. Now did you see anybody with any flares or flagmen or flags or signs from the wrecker up towards the crest of the hill?

A. No.

Q. How was the hill from where the wrecker finally put itself on the highway, up towards the crest, as far as you could see, with reference to the covering of the road?

A. It was slick.

Q. And that was true up to the time this collision occurred?

A. Yes.

Q. After the impact, of course, the Page wrecker went to Wells, did it not?

A. Yes.

Q. And your wife rode with them and your son?

A. Yes. [168-169]

Q. And of course that was to get out of the cold and discomfort. Then did you notice, when you went over and saw your wife, you said she was not injured?

A. Yes.

Q. And you were concerned about your wife. How about the windshield, was it broken at all?

A. Never looked.

Q. Now you went to Wells that day, didn't you?

A. Yes.

Q. And after the ambulance came and took the injured people to Elko, your little trailer was

(Testimony of Robert Shaw.)

pulled up on to the highway by another wrecker, was it not? A. Yes.

Q. That is your Ford was towed up on the highway by some other wrecker, was it not?

A. Yes.

Q. How did your car get to Wells, Nevada?

A. I drove it.

Q. That means your car was not wrecked?

A. No.

Q. Except for the break where the tongue had been disconnected, pushed into it. When you got on top of the crest of the hill to the east, going towards Wells west over the crest—about what time was it that you drove your car to Wells, Nevada? A. About noon. [170]

Q. Pretty close about the time the wrecker that had the De Soto went into Wells, or did you leave before? A. I think he was after me.

Q. What did you see when you got on top of the hill, with reference to any water, ice, or what was the condition of the road?

A. The condition of the road was it was dry.

Q. How far east towards Wells?

A. I think there was just one slick spot that I remember.

Q. About where was that, if you remember, about how far over the crest?

A. I don't remember. It was along the way somewhere.

Q. Otherwise the road was good? A. Yes.

Mr. Wright: Thank you, that is all.

(Witness excused.)

MRS. LORETTA SHAW

a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hanson): Will you state your name please? A. Loretta Shaw.

Q. You are the wife of the gentleman who just testified? A. Yes.

Q. And his first name is Robert? A. Yes.

Q. Directing your attention to December 31, 1954, do you [171] remember an accident that happened about 14 miles west of Wells, Nevada on Highway 40? A. Yes.

Q. Directing your attention to that morning and around nine o'clock, was the car that you were riding in involved in an accident? A. Yes.

Q. Who was in the car at the time?

A. My husband and my brother and my little son and myself.

Q. What happened to your car that caused it to get in an accident, the car you were riding in?

A. Well, we were pulling a trailer and the wind started swinging the trailer around and swung the car over across on the other side of the road.

Q. Was the highway approximately east and west at that point, as you remember it?

A. Yes.

Q. And which side of the road did your car need to be on, your left or right, as you were going east? A. Left.

Q. What happened when your car came to a

(Testimony of Mrs. Loretta Shaw.)

stop on the north side of the highway, and the trailer?

A. Well, my husband and my brother got out and looked the situation over and saw they couldn't get back on the road, so the first car that stopped said they would call the wrecker. [172]

Q. Do you remember Mr. Page's wrecker coming to the scene from Wells? A. Yes.

Q. What did you do after that Page wrecker came to the scene?

A. I took the baby and got in the cab of the wrecker.

Q. At that time where was the wrecker on the highway? A. When I got into it?

Q. Yes.

A. Well, it was just facing the direction we came from and they hadn't got into position to get the trailer out.

Q. Did you get in the seat in the wrecker after it got in position to get the trailer out?

A. Yes.

Q. Which way was it facing then, do you remember?

A. Well, it was facing southeast, I guess it was; it was towards Wells, but it was across the road.

Q. Was it on the north half of the highway?

A. Yes.

Q. While you were in that cab of that wrecker, state whether or not there were any other cars passed the wrecker at that point?

A. Yes, there were.

(Testimony of Mrs. Loretta Shaw.)

Q. Did you have any trouble or difficulty in going around the wrecker? A. No. [173]

Q. How far could you see towards Wells as you sat in that wrecker?

A. About the top, to the rise.

Q. Could you see the car, which you later learned was the Duff car, come over that rise and approach the wrecker, when you were sitting in it?

A. Yes.

Q. As you saw that car come over the rise, did you make any observation as to its speed as compared with other cars you had seen coming in that direction?

Mr. Wright: Incompetent, irrelevant and immaterial as to any comparison with other automobiles, and also not sufficient foundation laid as to whether or not this witness made any estimate or she knows whether or not she could.

The Court: Well, it might be objectionable as to comparative speed. Reframe the question.

Q. Can you tell us whether the car was coming fast or slow as it approached the point you were?

Mr. Wright: Objected to as leading and suggestive and whether or not she could estimate speed or did estimate.

The Court: Objection overruled.

Q. Will you tell us whether or not the car was coming fast or slow at the time you saw it?

A. It seems it was coming very fast.

Q. Did you observe whether or not the speed of the car you saw [174] coming over the rise

(Testimony of Mrs. Loretta Shaw.)

changed any from the time you first saw it until the impact occurred?

A. Well, it didn't change any that I saw until it started to skid.

Q. By that you mean it didn't decrease the speed until it started to skid, is that your testimony? A. That's right.

Q. Could you give us any estimate as to how far it was from the wrecker when it started to skid?

A. It was so close that I was afraid it wouldn't be able to turn out around and get by without skidding off the opposite side of the road.

Q. What part of the car, do you know, struck what part of the tow car you were sitting in, or the wrecker?

A. Well, the front of it struck it, probably the one fender. It was at sort of an angle.

Q. By "it" you are referring to the Duff car when it struck the wrecker? A. Yes.

Q. And the impact was on an angle when it hit the wrecker, or can you tell us?

A. Well, it seemed to be slightly at an angle, because it started to skid off to the north side of the road, but it wasn't much of an angle.

Q. What happened to the wrecker as a result of the impact with [175] the Duff car?

A. The wrecker was straightened around in the road, still on the same side, facing east.

Q. And what happened to the car where it did come to a stop? A. The Duff car?

(Testimony of Mrs. Loretta Shaw.)

Q. Yes, the Duff car.

A. I don't remember.

Q. Did you make any observation of it after it hit the wrecker?

A. Yes, it struck the wrecker and hit the back end of the trailer.

Q. Did it stop at that point, or do you know?

A. I don't know.

Q. Were you excited about that time?

A. I certainly was.

Q. Were you hurt in the accident? A. No.

Q. The baby wasn't hurt either? A. No.

Cross Examination

Q. (By Mr. Wright): At the time of the accident, was anybody else in the front seat with you and your baby? A. No.

Q. How about the windshield after?

A. I don't remember.

Q. Before the accident had you driven the car very much? [176] A. Yes.

Q. And did you form any estimation of the speed of the car in miles per hour? A. No.

Q. Now the car was coming toward you, coming down hill, was it not? A. That's right.

Q. And it would be more difficult to determine whether the car was checking its speed since it was coming at a person, wouldn't that be somewhat of a difficult procedure?

A. Well, I think it is rather a difficult question.

Q. In other words, what I am getting at, if you

(Testimony of Mrs. Loretta Shaw.)

see a car from the side, you can tell whether it is slowing down much more easily than whether a car is coming toward you, is that not true? Do you know?

A. No, don't you think you can tell whether a car is coming slower than before, even if you don't see it coming toward you?

Q. Well, I was just asking you. I don't happen to be put on the spot.

The Court: Well, of course, we always joke about the ladies taking charge, and this is pretty good evidence. You are doing all right. Just keep right on.

Q. You were sitting in the cab of the wrecker and the impact occurred and of course you saw the back end of the wrecker move. [177] Will you just tell us to what extent you observed or felt or knew that the wrecker moved, the front end, side, back, etc., and what was its position with reference to where it was before? Do you understand the question?

A. I believe so.

Q. Yes?

A. Well, I saw where the car hit and it was toward the back of the wrecker and I saw where the wrecker was after the impact had occurred, after the accident had occurred, and as far as I remember, that is what I judge by, because naturally when something hits you, your thoughts get somewhat confused.

Q. The back end then sort of swinging around?

A. Well, yes, it was.

(Testimony of Mrs. Loretta Shaw.)

Q. And straightened out so it was more or less parallel with the road afterwards? A. Yes.

Q. How about the front end? Did it seem to stay about where it was, or move?

A. It seemed to move a little bit up, not forward.

Q. How much would you say by a little up, not forward? Give some description.

Q. It was still on the north side of the road, not across the line, so probably a foot or two, possibly three.

Mr. Wright: That's all.

(Witness excused.) [178]

MELVIN MILLS

a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hanson): Will you state your name please? A. Melvin Mills.

Q. Where do you live?

A. Wells, Nevada.

Q. What is your occupation?

A. Construction worker.

Q. How long have you lived in Wells?

A. A year ago last March.

Q. Do you know Mr. Page? A. Yes sir.

Q. Directing your attention to December 31, 1954, around nine o'clock in the morning, or maybe a little bit before that time, what were you doing on that day?

(Testimony of Melvin Mills.)

A. On that day I had to report to the doctor at Elko.

Q. How did you go to Elko.

A. By car.

Q. Your own automobile? A. Yes sir.

Q. Was anyone else with you? A. Yes sir.

Q. Who was with you? A. My boy. [179]

Q. How old is he? A. Seventeen.

Q. When you reached a point about 14 miles west of Wells, did you see anything that was on the highway? A. Yes sir.

Q. Tell the jury and the Court what you saw.

A. Coming down the highway, I could see a truck, first the top of the truck on the crest of the hill.

Q. What kind?

A. Transport—I couldn't say—Interstate.

Q. Did you see anything else?

A. Yes sir, a little farther I could see a red light blinking on and off.

Q. What was that red light on?

A. On the wrecker.

Q. Did you later determine whose wrecker that was? A. Yes sir.

Q. Whose was it? A. Mr. Page's.

Q. Where was that wrecker when you got down where it was?

A. Sitting right close to the shoulder of the road, about as far as he could take off. I would say about 45 degrees.

Q. Did you see anything else at that time?

(Testimony of Melvin Mills.)

A. Something behind it, but what it was I couldn't say.

Q. Did you see another car to the north of the highway? [180]

A. There was a car there but I didn't see it.

Q. Did you stop there? A. No sir.

Q. What were the atmospheric conditions as to visibility at that spot as you came over the crest of that hill? How far could you see?

A. I would say about a mile.

Q. What about road conditions at that spot, as you come over the crest of the hill down to where this wrecker was? A. Slick ice.

Q. How about road conditions between Wells and the crest of the hill?

A. It was spotty, I would say slick, good spots there.

Mr. Hanson: Your witness.

Cross Examination

Q. (By Mr. Wright): When you came down the hill, did you see somebody out there flagging?

A. No sir.

Q. Wasn't anybody flagging at all?

A. Not that I noticed.

Q. Did you see Mr. Page or anybody around the wrecker? A. Yes sir.

Q. When you came down from the top, was there anybody coming up? A. No sir.

Q. So you had an unobstructed view clear down to where the [181] wrecker was setting on the road?

(Testimony of Melvin Mills.)

A. That is right.

Q. You didn't have to worry about a car or truck coming up the hill, did you? A. No sir.

Q. And your boy was driving? A. Yes sir.

Q. And, of course, you are familiar with that section, aren't you? A. Yes sir.

Q. You know about that hill? A. Yes sir.

Q. You seen some slick spots?

A. The road, like I said, was slick in spots.

Q. That was up the crest of the hill, so you don't know what the boy was thinking about as he came to the crest and over the other side?

Mr. Hanson: Objected to——

The Court: I don't think this witness is qualified to testify.

Q. About what time of day was it that you passed this wrecker?

A. I would say somewhere in the neighborhood of nine o'clock.

Q. About nine a.m., and that wrecker was then at that time on the west bound part of the highway? A. Yes.

Mr. Wright: That's all. [182]

Jury admonished and recess taken at 4:45 p.m. until Monday, November 14th.

Monday, November 14, 1955

Presence of the jury stipulated.

The Court: As I recall, with the consent of the plaintiff, and for the convenience of witnesses, the defendant had put on three witnesses out of order. Is that correct?

Mr. Pike: That is correct.

The Court: And the plaintiff?

Mr. Wright: We are ready, if the Court please. I would like to call Mrs. Jennie R. Duff back for a couple of questions.

JENNIE R. DUFF

having been previously sworn, testified as follows:

Direct Examination

Q. (By Mr. Wright): Mrs. Duff, I am not sure whether I asked you whether or not you had been in a previous accident or had been previously injured? A. No sir, I have not.

Q. And the chest, the sternum, had you ever had that fractured? A. No sir.

Q. Had you ever had it caved in?

A. No sir.

Q. And before the accident occurred, was there any depression [183] of the sternum, the middle part of the chest? A. No sir.

Mr. Wright: That's all the questions I have.

Mr. Pike: No questions.

(Witness excused.)

ELIZABETH BRONSON

one of the plaintiffs, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Wright): Your name is Elizabeth Bronson? A. That's right.

Q. You are one of the plaintiffs in this action?

(Testimony of Elizabeth Bronson.)

A. Yes sir.

Q. Where do you live, Mrs. Bronson, plus any specific address?

A. 533 Grant Street, Vallejo, California.

Q. And that is in California?

A. Yes, in California.

Q. And have you lived around in that area more or less for a considerable number of years?

A. I have lived in California two years last August 1st, but I lived in Benecia nine months up until last March but I went back to Vallejo.

Q. I mean more or less in that same area?

A. That's right.

Q. You are the sister of Jennie R. Duff, one of the other plaintiffs, are you not? [184]

A. That's right.

Q. Is she older than you are?

A. She is older.

Q. What is your age, please?

A. Fifty-eight.

Q. Are you married? A. Yes.

Q. You have been married?

A. I have been married.

Q. Calling your attention to the 31st day of December of 1954, were you up in Idaho?

A. I was.

Q. And in connection with some other matter, I take it, and found yourself on December 31, 1954 in Burley, Idaho? A. Yes, I did.

Q. How did you go to Idaho?

A. Went up by bus.

(Testimony of Elizabeth Bronson.)

Q. And did you have an original plan about coming back?

A. I was coming back on the bus.

Q. And then was there a change in your plan?

A. Mr. Duff, who is my brother-in-law, and my sister was taking, Jennie Duff, was taking their vacation and said if I would wait two days until he finished with his business, he would take his car and I just as well go back with them.

Q. Then did you agree to pay any of the gasoline—you were [185] just riding with them?

A. I was just riding with them.

Q. It wasn't in connection, then, with any business of yours or business of Mr. Duffs that you were going to go with them? A. No.

Q. Merely the fact if you stayed over a couple of days, you could ride with them?

A. That's right.

Q. Then on December 31, 1954, did you start out with Mr. and Mrs. John Duff?

A. I did.

Q. Tell us about what time you left Burley, Idaho?

A. About ten minutes to six a.m.

Q. That would be mountain time?

A. That is right.

Q. Is that one hour ahead of standard time?

A. Yes, one hour ahead.

Q. Then just briefly now, your general course was up to Wells—don't go into details, but just general course up to Wells, Nevada.

(Testimony of Elizabeth Bronson.)

A. You mean what we did?

Q. No, where did you go, the general outline?

A. Well, from Burley to Mertil, from there to Twin Falls and then on to Wells, Nevada.

Q. That main road going down to Wells, Nevada? [186]

A. That is right.

Q. During that time was there any snow condition covering the highway that you encountered?

A. There was snow at times, quite a little bit, before we reached Wells, patches of snow.

Q. Where did that snow condition first—where did you encounter that?

A. Somewhere around Rogeston.

Q. As to the roads from Rogeston, Idaho, through Contact and into Wells, what generally were the condition of the covering of the highway?

A. Well, there were patches of ice and snow, but it wasn't too slick.

Q. And was there anything unusual that happened while going from Rogeston to Wells on that trip that morning?

A. My sister said she was sleepy and she climbed over the front seat and she laid down on the seat and covered up with a blanket.

Q. What I had in mind, was there anything unusual with reference to the operation of the car by Mr. John Duff?

A. No.

Mr. Hanson: Objected to—

The Court: Objection sustained. The answer will be stricken.

(Testimony of Elizabeth Bronson.)

Q. When you got to Wells, Nevada, who was driving? A. Mr. Duff. [187]

Q. You were seated where?

A. On the opposite side.

Q. On your right-hand side?

A. On my right-hand side.

Q. And Mrs. Duff?

A. She was back lying down, in the back of the car.

Q. Did you stop at Wells, Nevada, or go through?

A. Went on through, we didn't stop.

Q. Then as you went westward from Wells, Nevada, were you on highway U. S. 40?

A. That's right.

Q. After you left Wells, Nevada, tell us the condition of the road as you proceeded westward on U. S. 40.

A. There were patches of snow and some ice, but not too bad.

Q. And outside of the patches, what was the condition of the road surface?

A. It was dry. Probably a little water, but it wasn't dangerous.

Q. What can you tell us about the speed, of miles per hour, Mr. Duff was travelling from Wells, Nevada?

A. To my recollection, and I did look at the speedometer before, he didn't go faster than 45 miles.

Q. You say that you looked at the speedometer

(Testimony of Elizabeth Bronson.)

at times? A. I did.

Q. Do you remember about what was the last time you looked at the speedometer? [188]

A. Before we reached the crest of the hill.

Q. And what did the speedometer show at that time on the Duff car?

A. Showed forty-five.

Q. Up to the crest of the hill—and by that do you mean the crest of the hill that is immediately east of where the accident later occurred, would be the first hill? A. Yes sir.

Q. So in speaking of the crest, you will refer to that then as the particular hill, will you?

A. That is right.

Q. Where, with reference to that crest of the hill, was it that you last looked at the speedometer?

A. Yes, it was before we reached the crest.

Q. What was the speed of the Duff car from there, where you looked at the speedometer, up to the time of reaching the crest?

A. You mean on our way, before we reached there?

Q. Yes.

A. Well, it hadn't increased any more than forty-five. I never seen Mr. Duff's car exceed 45.

Q. I was trying to get comparison. You read it 45 miles then before you reached the crest?

A. That is right.

Q. What was the comparison of the speed of the car from where [189] you looked to the time you reached the crest? A. About the same.

(Testimony of Elizabeth Bronson.)

Q. What did you see about the roadway itself before you arrived at the crest of the hill? Did you notice that? A. It was dry.

Q. Now tell us, before you arrived at the crest, describe the highway, as to whether it was a steep grade, a gradual grade or more flatter. In other words, give us a picture of the topography of the road as to grade, or whatever it was, please.

A. Well, the grade wasn't very steep. It was just a gradual climb.

Q. And then as you came to the crest, in going over the crest of the hill, what, if anything, did you notice when you got on the other side going downward—the road does go downward, does it when you are going west? A. Yes.

Q. Tell us what you noticed and what you saw when you got over the crest of the hill and going down the hill to the west, please.

A. It was dry. The first thing I noticed was a big truck coming toward us.

Q. And where was the Duff car when you first noticed this big truck coming toward you?

A. We had gotten over to the top of the crest. The truck was on the opposite side of the street coming toward us. [190]

Q. You mean the highway?

A. Yes, the highway.

Q. Where was the truck when you first saw the truck?

A. I imagine it was—it wasn't to the bottom of the hill quite. I just don't know.

(Testimony of Elizabeth Bronson.)

Q. Then did the two vehicles pass each other, in the sense of meeting each other and going by each other? A. They did.

Q. And about where did that procedure take place with reference to the bottom of the hill, middle or top of the hill, or any place along the line, if you could fix it for us?

A. I would judge that we would be about one-third the way down and they two-thirds up, to my recollection.

Q. And was there any impact or striking between the two vehicles? A. No.

Q. Before the two vehicles passed each other, did anything on the truck attract your attention, or the truck do anything to attract your attention?

A. Yes.

Q. What was that?

A. Blinked its lights at least twice.

Q. And at that time did you know what that meant?

A. I did not. I thought it was a friendly gesture.

Q. Tell us whether or not you understood the blinking of the [191] lights, or did that give you any idea of any danger to be encountered, or anything of that nature?

Mr. Hanson: Objected to as repetitious. She has told us what she thought about it.

The Court: Objection sustained.

Q. After the two vehicles went by each other, I take it Mr. Duff kept on going down hill?

(Testimony of Elizabeth Bronson.)

A. That's right.

Q. On which side of the road was he going as he went by the truck and on down?

A. On the right side.

Q. What, if anything, did you see after going by this big truck?

A. I noticed a yellow or an orange trailer up off to the right side of the road and ahead of that a dark car, I can't tell you what color, but it was dark.

Q. Were those objects on the roadway itself or off the road?

A. They were off to the side of the road.

Q. Did you see any other vehicles?

A. Not at that time I didn't.

Q. And then what was Mr. Duff, as to his speed, compared with the speed when you went over the crest, please?

A. To my knowledge, Mr. Duff was slowing down.

Q. And as you went down the hill there, did you pay any attention to the highway covering, and if so, what did you notice as to that? [192]

A. I didn't observe anything about the highway because my attention was drawn to the truck at first and then to the objects at the side of the road later.

Q. Then as the Duff car went down, did you notice anything further as it approached the orange and the parked object off to the side of the road? Did you notice anything further?

(Testimony of Elizabeth Bronson.)

A. I noticed nothing until we started to skid.

Q. When you started to skid, what did you notice?

A. I noticed there was a wreck ahead. It was right directly in front of the right lane, right in front of us.

Q. Tell us about how far the Duff car was away from the wrecker when you first noticed it.

Q. I would judge between 100 and 150 feet. I am not too good at judging, but just my judgment.

Q. Did you see the wrecker before the Duff car started sliding or after? A. After.

Q. When the Duff car started sliding, which way was it pointed? Describe the manner of sliding.

A. It was sliding sideways, facing the north, the Duff car was facing the north.

Q. When it slid, which direction did it slide, the Duff car?

A. It slid somewhat down the road. It would be sliding west and it was facing north.

Q. In other words, do I get the picture, it slid more sideways? A. That's right. [193]

Q. And with reference to the road, was it sliding directly down the road, or at an angle, or what?

A. It was sliding a little bit with the front headed—well, a little on an angle, but sliding sideways.

Q. And in general which way were you sliding? In other words, were you sliding west and a little

(Testimony of Elizabeth Bronson.)

bit to the north there, or more or less west, or what?

A. More or less west.

Q. Then what, if anything, did you notice about the wrecker, as to the position it occupied on the highway?

A. The wrecker was setting directly straight, north and south, to my knowledge.

Q. What part of the highway did it occupy?

A. It occupied the north lane, or the right-hand side lane.

Q. What we call for west-bound traffic?

A. That's right.

Q. Tell us what you noticed as to any lights on the wrecker, if any?

A. I saw no lights, saw no blinking light at all.

Q. Then was there a collision?

A. There was.

Q. What part of the Duff car collided with what part of the wrecker, as far as you can tell us?

A. As far as I can remember, the Duff car about the front and the middle of the Duff car hit the, well, the back part of the wrecker. [194]

Q. That would be the left-hand side of the wrecker? A. That's right.

Q. On the left part, not on the right part?

A. That's right.

Q. And I take it, then, the front end of the wrecker, was that headed toward the south or toward the north? A. That was headed south.

Q. Then from the point of impact with the wrecker, what facts do you know?

(Testimony of Elizabeth Bronson.)

A. I knew I hit the front of the car with my head more or less, the top of the windshield.

Q. Do you recall about the car after the impact with the wrecker, how far it went or where it stopped? Can you tell us about that?

A. It didn't go very far. It stopped right away.

Q. What do you recall after the impact about it? Tell us that please. In other words, did you see it come to a stop, or you know it stopped, or what?

A. Yes, I know it stopped.

Q. What do you recall after the impact, the first thing you recall?

A. I recall I was lying down in the front seat, with my head toward the south, and Mr. Duff was lying across me with his head sort of in my lap. Is that what you mean? [195]

Q. Yes, that is what I mean. Then were you taken out of the Duff automobile?

A. I was.

Q. And put in the Ford?

A. That's right.

Q. And then the ambulance came and took you to the Elko General Hospital?

A. That's right.

Q. When you got to the Elko General Hospital, I take it then that you got a chance to sort of ascertain, know, what had happened to you?

A. That's right.

Q. Now when you started to ascertain what had happened to you at the Elko General Hospital, tell us what you found had occurred. What parts of your body seemed to be involved, please.

A. My head hurt. It hurt until it seemed almost

(Testimony of Elizabeth Bronson.)

more than I could stand. They kept me under anesthetics.

Q. You mean narcotics?

A. Narcotics, anything you might call it, but it is drugs.

Q. What part of your head was involved? In other words, I want you to describe it please.

A. My head was hit here.

Q. What side please?

A. On my right side and it was swollen from the top of my head to the bottom of my chin. [196]

Q. On your right side?

A. Right side, and I was bruised and black to my waist on the right side.

Q. On the right side? A. That's right.

Q. Then did you notice any headaches or pain, anything of that nature?

A. It was nothing but headaches and pains.

Q. How about your upper chest, did the chest bother you at all?

A. My chest pained terrible.

Q. In what area?

A. Well, all through my chest.

Q. Then you stayed in the hospital about how long?

A. We were in the hospital from the last day of December until the 22nd day of January.

Q. How about your left shoulder? Did you notice anything else beside what you already described?

A. To my knowledge my left shoulder was broken and thrown completely out of the socket.

(Testimony of Elizabeth Bronson.)

Q. Anything about your neck and back?

A. My neck hurt terribly.

Q. What part of your neck seemed to hurt when you were in the hospital?

A. All from the back, back end and up into my head.

Q. And during your stay in the hospital, did the doctor perform [197] any surgery on you?

A. Dr. Trehune set my arm, my shoulder.

Q. Your left shoulder?

A. Left shoulder, and he also put a harness around my body, because I had several ribs broken.

Q. Any face condition?

A. My face was just all swollen and in the hospital they made light of it, but I had a great bruise across my face.

Q. Was there a draining out of any fluid, blood or anything like that?

A. The last week I was in the hospital Dr. Hood drained that with a needle, as if you were taking a blood test from your arm, and he drew quite a lot of black blood out of the side of my cheek three different times.

Q. That was on the right cheek?

A. That was on the right cheek.

Q. From that have you got any markings on the right cheek? A. I do have.

Q. Could you point them out to the jury and then I will describe them.

A. Right here.

Q. You are describing on the right cheek ap-

(Testimony of Elizabeth Bronson.)

proximately the mouth line and on the right cheek?

A. That's right.

Q. Now you left the hospital on, I think you said, January 22nd? [198] A. Yes.

Q. Tell us, were you fully recovered from the injuries or if you still had some pains? Tell us about that date, which might probably fix it in your mind as a special date?

A. I had not fully recovered, but the doctor said that I could leave if I had some one to accompany me on the train from Elko to my home town.

Q. Then did you make arrangements for some one to go with you? A. Yes sir.

Q. Who was that?

A. My sister from Vallejo, California.

Q. What was her name?

A. Elfreda Nielson.

Q. Did she then make a trip up from California to come up and go back with you? A. She did.

Q. What pains or discomfort did you notice the day you left the hospital and tell us if you had any apparatus on and what you had on.

A. I still had this harness around my ribs to hold my ribs in shape. I was still wearing that and my arm was still in a sling. They had removed the adhesive that held it up, so I had to have my arm in the sling.

Q. That is your left arm?

A. Left arm. [199]

Q. Did you notice any more pains?

A. My arm and shoulder pained all the time.

(Testimony of Elizabeth Bronson.)

Q. With reference to your chest, had that cleared up?

A. It had cleared up some, but I still had pains in my chest.

Q. And your neck?

A. And my neck was bad yet.

Q. And describe that more fully. When did it pain you?

A. It pained me all the time at that time?

Q. What part?

A. Mostly from my shoulder, from my left shoulder up clear to the top of my head.

Q. And then you went by train, did you?

A. I went by train.

Q. How did you get from the hospital down to the train in Elko, Nevada?

A. State that again.

Q. What means of conveyance—how did you get from the hospital to the train in Elko?

A. I went by taxi.

Q. How much was that charge?

A. That was only fifty cents.

Q. Then on the train, you went by train to Berkeley, California? A. That's right.

Q. Did Mrs. Nielson go with you?

A. She did. [200]

Q. Then when you got to Berkeley, that is a little distance from Benecia? A. That's right.

Q. How did you get from Berkeley to Benecia?

A. My neighbor had a new car and he and my daughter came to Berkeley and took me home.

(Testimony of Elizabeth Bronson.)

Q. You had made arrangements for them to meet you? A. That is right.

Q. How far is it from Berkeley to Benecia?

The Court: Mr. Wright, it seems to me that you are near to the end of this. Are you going to finish today?

Mr. Wright: Well, all right. I am sorry, if the Court please.

Q. Was there any charge that you paid, or has there been any charge incurred in connection with the trip from Berkeley to Benecia?

A. I gave Mr. Madsen five dollars.

Q. After you got in Benecia at your home, did you see any doctors?

A. I didn't for a short time. I was too sick to leave.

Q. Did anybody take care of you for a few days or so?

A. The day I reached home was Sunday and my daughter works at Mare Island for the government and she stayed home with me on Monday and Tuesday after my return home. [201]

Q. And the purpose of her staying home was to take care of you? A. That's right.

Q. What wages does she ordinarily get?

A. Ten dollars a day.

Q. And she lost those two days?

A. Yes sir.

Mr. Hanson: That has no bearing.

The Court: I agree with you, counsel. We are not concerned with how much, if any, such jobs pay.

(Testimony of Elizabeth Bronson.)

Q. What would you say as to the reasonable charge for somebody to take care of you for those two days, Monday and Tuesday?

A. Well, the reasonable charge — she lost ten dollars a day, but for the reasonable charge I wouldn't know. I imagine I would have to pay her ten dollars a day.

Q. With reference to somebody in a capacity for practical nurse?

A. That's right; or maybe more.

Q. Then what doctors did you see?

A. I seen Dr. Lee, I don't remember his first name, of Vallejo first.

Q. Then did you see further doctors?

A. Yes, I saw Dr. Grover of Vallejo.

Q. And then any other doctors?

A. Well, I saw Dr. Brockbank of Petaluma.

Q. And Dr. Brockbank has his office in Petaluma? A. That's right. [202]

Q. Somewhere along there did you move from Benecia over to Vallejo?

A. The first of March.

Q. Of 1955? A. That is right.

Q. Have you resided in Vallejo continuously from March first to the present time?

A. Yes sir.

Q. About how many trips did you make from Vallejo to Petaluma to see Dr. Brockbank?

A. I made a trip over there every week. I imagine close to 40 trips.

(Testimony of Elizabeth Bronson.)

Q. How did you get back and forth from Vallejo to Petaluma?

A. Up until we could make arrangements with Dr. Brockbank, I had to have my neighbors take me in the car, but we finally made arrangements with Dr. Brockbank to see me on Sunday when my daughter was home and she drove my car.

Q. With reference when you had the neighbors, how would you arrange with reference to the cost of transportation?

A. I paid two and a half different times. I just paid gas for the car, two and a half gas for the car each time and one time I think is three—every time my neighbors took me.

Q. Then with reference to the times you took your own car, it would take some gasoline, I would take it?

A. It would take about \$1.50 for gasoline.

Q. For the round trip? [203]

A. For the round trip.

Q. And have you progressed? In other words, what is your condition at the present time?

A. I have made quite a progress in my shoulder and my neck and my head, but yet I still am in so much pain at times that I can't sit down. My nerves are very bad.

Q. Now the pain you are in, is that a steady pain or comes and goes?

A. No, it is not a steady pain.

Q. Where is the pain when you do notice it?

A. It is in my head mostly now. My shoulder is

(Testimony of Elizabeth Bronson.)

better but my head is the one that pains me the most.

Q. Do you have any pain about the left shoulder?
A. I certainly do.

Q. Where is the pain when you have it?

A. Up to my neck and down to my lip.

Q. On the left?
A. On the left.

Q. Does that pain all the time or intermittant or how often?

A. It is intermittant, comes and goes, but if I am tired, like riding on the bus from Vallejo here, it pained me all night last night and still pains this morning.

Q. And how about your head, when you turn your head or move it up and down to the right or left, do you notice any pain?

A. I have to be awfully careful how I twist my head. I can move [204] it, yes, but I have to be very careful.

Q. Where do you notice pain?

A. Mostly from my left shoulder way up to my neck, up my left side.

Q. Do you notice any pain in back of your head on the other side?
A. Yes, I do.

Q. Now with reference to your left arm, what use, or lack of use of the shoulder and left arm do you have?

A. I can't pick things up, that is, move things of any weight at all. For instance, in canning fruit in summer, I can't tighten the fruit jars. I have to wait until my daughter came home to put my

(Testimony of Elizabeth Bronson.)

fruit in jars and she could tighten them down. I don't have any grip. I do have some, but not the way I used to.

Q. How about doing house duties, such as sweeping or running the vacuum cleaner or cooking? Does it affect you at all, or if not, so state.

A. With my minimum bit of work I could get along, but if I had to do a lot of work, I couldn't. My left arm and shoulder would be played out; I couldn't.

Q. Is there any large limitation of movement in your left shoulder? A. Yes there is.

Q. Tell us about that. [205]

A. I can't raise my arm above my head to the extent I did before and I can't get it behind.

Q. How about fastening and unfastening your brassieres? A. That's out.

Q. Could you do it before? A. I could.

Q. Is that because you can't get your left hand back? A. That's right.

Q. And did you do any work before the accident?

A. Yes, I was taking care of a little girl.

Q. And since you went back to Benecia have you done any taking care of children?

A. No, I have not.

Q. Why is that?

A. I just can't do it. My nerves are too bad.

Q. How much did you make before the accident, with reference to taking care of children?

A. I made \$15 a week.

(Testimony of Elizabeth Bronson.)

Q. Was that steady?

A. That was a steady income, five days a week.

Q. And since you say you haven't taken care of children?

A. No, I have not.

Q. Was that a steady job? In other words, was it for different children or——

A. Just one child. [206]

Q. Now with reference to your left shoulder itself, does it give you any discomfort, in the manner that you wear your clothes?

A. Yes.

Q. What is that?

A. Well, I have a lump on my left side. I try to fix it so it isn't noticeable and the straps from my slip, or anything I might wear, slips down and it is very discomforting.

Q. And why do the straps slip down?

A. Because my shoulder seems to be out of the socket and I have this lump up here and it slips off.

Q. I wonder if you would step down before the jury and just walk slowly, so as to show your right cheek. (Witness complies.)

Jury admonished and recess taken at 11:00 o'clock.

11:15 A.M.

Presence of the jury stipulated.

Mr. Wright: If the Court please, during the recess we had a conference with defendant's attorneys and they have stipulated, not that they are liable for the respective bills, because that is an issue for the jury, but with reference to the following bills that they were incurred on behalf of

(Testimony of Elizabeth Bronson.)

Mrs. Elizabeth Bronson as a result of this accident, and that if these respective people were called, they would testify that they were reasonable charges. That is correct?

Mr. Hanson: That is in the interest of time.

Mr. Wright: Elko Clinic, \$217.00; Elko General Hospital, \$398.95; H. B. Grover, M.D., Vallejo, \$10.00; Dr. Lee, Vallejo, \$3.00; Betty Jo Bronson, 2 days practical nursing, \$20.00; Alfreda Nielson, January 23, 1955, covers trip to Elko and return, total on bill, \$52.-5; Dr. Butler and Vern W. Ritter, radiologist, Santa Rosa, \$25.00; ambulance by City of Wells for taking all three patients from scene to Elko, \$35.00. Of course we only claim charges on that for one person—\$35.00 for three people. And I would like to file these bills, if the Court please, as plaintiffs' exhibit.

Court: Very well. They may be received as plaintiffs' Exhibit 17.

Mr. Wright: And also travel expense of plaintiff, Elizabeth Bronson, from Elko by train and her berth, which was \$21.54, Elko to Berkeley.

Mr. Hanson: That is under the same stipulation.

Mr. Wright: Same stipulation. And also meals on the train of Mrs. Bronson was \$1.50. Same stipulation.

Q. Mrs. Bronson, I do not think I asked you, did you notice what about the color of the wrecker from the time you saw it up until the time of the wreck? What did you notice about that?

A. I noticed the color was very light blue,

(Testimony of Elizabeth Bronson.)

blended in with the road so perfectly that I didn't notice it until we were skidding toward it.

Mr. Wright: I believe that is all the questions on direct. [208]

Cross Examination

Q. (By Mr. Pike): Mrs. Bronson, what was the condition of the highway right in the immediate vicinity before you came to the car that was off in the barrow pit on the right-hand side?

A. You mean from the top of the slope?

Q. Well, from the crest of the hill. Describe the road surface as you came down the hill.

A. I didn't observe the road at all until we started to skid. My eyes were glued to the truck and then to the objects that were to the side of the road. I can't say until we started in this skid.

Q. What was the condition of the highway, as far as the surface is concerned, right at the crest of the hill where you started down?

A. Well, I didn't observe the condition of the hill. You mean the road? A. Yes.

A. I was watching the truck.

Q. In other words, you don't know whether there was snow on it or whether it was dry or what?

A. I wasn't paying any attention. Mr. Duff was doing the driving and was doing a good job of it. I had no occasion to pay any attention. My eyes were drawn to the truck and from there to the wrecker at the side. [209]

Q. Is it a correct statement then that after you came over the crest of the hill that you didn't

(Testimony of Elizabeth Bronson.)

observe the surface of the road, the condition, as to whether it would be wet or was snow or ice or otherwise, until you started to skid?

A. I didn't.

Q. And approximately how far were you from the car in the barrow pit and the orange trailer when you started to skid?

A. To my knowledge we were, as far as I can judge—I am not too good a judge—but I would say from 100 to 150 feet.

Q. You stated you didn't observe the condition of the road from the crest of the hill on down until you started to skid. Will you please state what the condition of the road was for the last half mile before you came to the crest of the hill?

A. I know that part of the road was quite dry.

Q. Did you pay any attention to it, Mrs. Bronson, or is that just from, you might say, speculation on your part?

A. I did pay attention because I was watching the road then. There was nothing to stop my view and the road was quite clear and dry. There were wet spots along and possibly a few icy spots, but if any, they were not anything to worry about.

Q. Then going back a distance of more than half a mile, before you came to the crest of the hill, what were the road conditions?

A. That is back farther?

Q. Yes, farther on east from Wells.

A. There were icy spots there and some snow, not much, then very [210] little, just wet.

(Testimony of Elizabeth Bronson.)

Q. You were seated beside Mr. Duff in the front seat, of course, and you were awake?

A. That's right.

Q. And after you started down the crest of the hill, did you have any conversation with Mr. Duff?

A. No sir.

Q. Did you either say anything to him or did he say anything to you? A. No sir.

Q. Possibly to refresh your recollection, did you say anything to him about there being a car in the barrow pit?

A. I may have, but I don't recall. I may have said something.

Q. You wouldn't be positive, however, one way or the other, whether you did or didn't?

A. No, I wouldn't, but I don't think I did.

Q. I believe you testified that you saw the orange trailer and the car off to the right-hand side of the road about the time that the car in which you were a passenger passed the truck that was going in the opposite direction on the hill?

A. Immediately after, yes.

Q. And at that time did you look on past the two objects that were off to the side of the road and you identified, as you have, the trailer and car?

A. I may have, but I don't recall a thing.

Mr. Pike: That is all. [211]

Redirect Examination

Q. (By Mr. Wright): You spoke of some icy spots in the road from Wells to the crest of the hill. What were the size of those icy spots?

(Testimony of Elizabeth Bronson.)

A. They may have been the length of the car. They weren't large.

Q. And you spoke of some snow spots. How about the snow spots?

A. Such a few snow spots that they didn't amount to much.

Mr. Wright: That is all.

(Witness excused.)

JOHN A. DUFF

one of the plaintiffs, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Wright): Your name is John A. Duff? A. Yes sir.

Q. You are one of the plaintiffs in this action, are you not? A. Yes sir.

Q. You live in Burley, Idaho?

A. Yes sir.

Q. What is your age please?

A. Sixty-six.

Q. How long have you lived in Burley, Idaho?

A. In Burley about two years.

Q. How about that vicinity around Burley, Idaho? A. Paul, Idaho.

Q. About how long have you lived in Paul?

A. Well, since we came back from California, about six years.

Q. Calling your attention to December 31, 1954, did you leave Burley, Idaho? A. Yes sir.

Q. And accompanied by your wife and Mrs.

(Testimony of John A. Duff.)

Bronson? A. Yes sir.

Q. And of course it has been testified, but your testimony would be the same, about going through Twin Falls to the Nevada line, through Contact and down to Wells? A. Yes sir.

Q. Now did you encounter any snow before you got to Wells, Nevada? A. Yes sir.

Q. Where?

A. Between the Nevada line and Wells.

Q. And what was the degree of snow, or how much? A. You mean how big it was?

Q. Well, yes, did it cover the highway or partially, or what? A. It covered the highway.

Q. And you were in your new 1955 De Soto sedan automobile? A. Yes sir.

Q. And I requested that you bring your certificate of title, so we can get the weight of it. Did you do that? A. It is down in the car.

Q. Did you check it and find out? [213]

A. No, I didn't, I forgot about it.

Q. Will you do that so we will have it after lunch? A. Yes.

Q. When you got to Wells, Nevada, did you stop or go through?

A. No, we didn't stop at Wells.

Q. As you went through Wells, Nevada, what was the seating arrangement of the passengers and who was driving?

A. I was driving and my sister-in-law, Mrs. Bronson, was seated side of me.

Q. Where was your wife, Mrs. Jennie R. Duff?

(Testimony of John A. Duff.)

A. She was in the back seat.

Q. And this automobile was a '55 De Soto sedan automobile? A. Yes.

Q. Purchased the latter part of December of 1954? We call it '55. A. '55.

Q. About how many miles did you have on the car when you started out?

A. When we started out I judge 200 some odd miles.

Q. Had you driven the car before you started out that day? A. Yes sir.

Q. Had you had any instructions from the dealer concerning the operation of the car?

A. Yes sir.

Q. And the speed as to what you were to break the car in? [214] A. Yes.

Mr. Hanson: Object to that as hearsay testimony.

Mr. Wright: I am just asking if he had instructions, not what they were.

The Court: You have asked him what they were. The objection is good. Sustained.

Q. Now take after you left Wells, Nevada. Tell us what you observed on the road. You are acquainted with the fact the accident occurred, are you not? You have heard us speak of the crest of the hill? A. Yes sir.

Q. Would you keep that in mind in giving us the description, the crest, when you speak of that, as being the crest immediately east of where the collision occurred. Now will you describe the con-

(Testimony of John A. Duff.)

dition of the road from Wells, Nevada up to that crest of the hill please?

Mr. Pike: State more definitely—immediately.

Mr. Wright: It is approximately one-half mile east of where the accident occurred.

The Court: Ask if there was an accident.

Q. Was there an accident involving your 1955 De Soto automobile? A. Yes sir.

Q. Do you know where that took place?

A. Yes sir. [215]

Q. Was there a crest of the hill to the east of where the accident took place? A. Yes.

Q. Now let us speak of that and call it the crest of the hill from now on please. Describe the condition of the road that you encountered from Wells to the crest of the hill.

A. From Wells on up to the top of the hill, this side of the underpass, it was snow and slush and after we got farther up there the road began to get better and they were wet in spots and icy spots and the farther we got on the west highway it began to get dry, just damp in spots.

Q. Going right out of Wells, Nevada, to the underpass, what was that condition?

A. Snow and slush.

Q. And from there?

A. From there kept getting better all the way up.

Q. Before you arrived at the crest of the hill, describe the contour of the road, as to up, down, flat, etc.

(Testimony of John A. Duff.)

A. Well, it wasn't flat, just gradually come up. It wasn't steep.

Q. And what was the condition of the road, say within a half mile before you arrived at the crest of that hill? A. The road was good.

Q. And by good, what do you mean by that?

A. It was dry. [216]

Q. And as you went over the crest of the hill, or approached the crest of the hill, what speed were you going? A. About forty an hour.

Q. As you went over the crest, tell us what you did and what you observed, please.

A. When I started over the crest of the hill, I had taken my foot off the accelerator and I could see that the highway was icy.

Q. And did you see any objects, please?

A. Yes, I seen a truck coming up the hill.

Q. Did you see any other objects before you arrived at the truck? A. Yes, before——

Mr. Hanson: Objected to as leading.

The Court: You may answer. I think we are just getting some preliminaries.

Mr. Hanson: I will withdraw the objection.

Q. Did you see any other objects besides the truck? A. Yes.

Q. What objects did you see?

A. It was an orange colored trailer and a black car.

Q. Tell us in what relationship you saw the orange trailer and the car and the truck, which you saw first, second, and third.

(Testimony of John A. Duff.)

A. Well, I seen the truck first and then I seen the orange trailer and before I got there I saw the orange trailer and [217] black car.

Q. Before you got there?

A. I mean after I got close to the truck I didn't notice the orange trailer because the road was slick and I was applying my brakes as much as I could to keep from going into a slide and I watched the truck until I got past the truck.

Q. You went by the truck then?

A. Yes sir.

Q. Where was it that you went by the truck, about what part, with reference to the hill, the foot of the hill, what point? Fix that for us.

A. I imagine about half way up, a little more.

Q. Then after you passed the truck, what did you do?

A. Then I kept applying my brakes and looked down the road and seen this here U-Haul trailer and black car. I was trying to stop.

Q. You say you looked down the road. How far did you look after you passed the truck?

A. Down the road, I looked down the road, past the orange trailer and the car.

Q. Did you see at that time any other objects on the road? A. No sir.

Q. Then you went on down the hill. Tell us how long you kept touching these brakes, putting them on, what further you saw, if anything? [218]

A. I kept putting them on all the way down the hill until I got to about 175 or 200 feet and I

(Testimony of John A. Duff.)

sighted this here light blue car with the light top on it and then——

Q. You saw a car?

A. Trailer, I mean the wrecker.

Q. Now did you notice what effect, if any, did your brakes have going down the hill, on your automobile? Did it slow down?

A. Not much. It couldn't slow down much. If you slow down, you start to slide. It seemed like it wouldn't slow down any at all because on my car you see it had a fluid drive.

Q. Did you have any compression going down?

A. No. No compression. You don't get compression—a little bit, but not much.

Q. About how far were you from this wrecker when you first saw it?

A. About 175 or 200 feet, somewhere in that neighborhood.

Q. What part of the highway did that wrecker occupy?

A. The wrecker, the front end, was about center of the highway, close to the center of the highway and towards the shoulder.

Q. Did you make any observation as to distance between the rear of the wrecker and the U-Haul trailer? A. Yes sir.

Q. What distance did you estimate?

A. It looked about 8 to 10 feet.

Q. In between? [219] A. Between.

Q. What, if anything, did you do when you saw that wrecker?

(Testimony of John A. Duff.)

A. When I saw the wrecker, I thought I could go between the wrecker and the U-Haul trailer off the shoulder and then I started to turn to go between the two on that shoulder and then when I put on the brakes we went sideways, when I made the turn, my car slid sideways.

Q. Slid sideways and how far did it slide and where did it slide to?

A. It slid and hit into the wrecker.

Q. Where, with reference to the right, did it anglewise across the road or straight down, or which direction?

A. It was sitting on an angle.

Q. Did you slide down the road or did you parallel the road or more to your right or to your left?

A. I slid to my right.

Q. And how much?

A. Well, I couldn't say exactly.

Q. What part of your vehicle came in contact with what part of the wrecker?

A. The left-hand side.

Q. Of your car? A. Of my car.

Q. And more specifically, what parts of your left-hand side?

A. Well, just the frame of the front door on the left-hand side [220] and I hit towards the back of his wrecker and it hit my left side.

Q. Did any part of your front of your car strike any part of the wrecker? A. No sir.

Q. Then what happened to your car afterwards, if you know, or can you tell us where your car went

(Testimony of John A. Duff.)

to and where it stopped? Did you observe that while it was moving or afterwards when your car came to a stop?

A. Well, I came to a stop as I hit the U-Haul trailer.

Q. Did you observe the hitting of the U-Haul trailer, or did you find it out later?

A. Found it out later.

Q. What do you remember next after the accident from the impact with the wrecker? What was the next thing that you recalled or recognized?

Q. The next I remembered is when the wrecker came with the dome light on top. That brought my attention. That is the first thing I remember.

Q. Which wrecker was that? Any other there than testified in this case so far?

A. Well, yes, I believe some wrecker from the Ford Garage, I think from Elko.

Q. And after the impact, did you see the Page wrecker around?

A. No. I never did see it after the impact. [221]

Q. Did you see Mr. Page? A. No sir.

Q. Did you talk to him? A. No sir.

Q. What can you tell us about the color of that wrecker that you saw in the road, with which you collided?

A. It looked to be a light blue color.

Q. And what was the road on past the wrecker, as to the color of the highway itself?

A. Well, it was ice and just blended in with the

(Testimony of John A. Duff.)

ice, this wrecker blended in with the ice, and I couldn't see it until I was right on it.

Q. Why did you turn to your right instead of turning to your left?

A. Well, the slope of the highway to the north was steep and——

Q. You say to the north?

A. To the south.

Q. That would be your left-hand side?

A. That would be my left, and it was slick ice and then I noticed it was better for me to go around that way. You couldn't see down the highway, whether anyone else was coming or not. It was easier to go between.

Q. You say easier in your position to go in the back rather than the front? A. Yes sir. [222]

Q. You said something about the road sloping, which way did it slope?

A. It sloped to the south.

Q. What was the condition of the gulley or ditch of the highway down on the left, as compared to the right?

A. To the right side it was kind of a cut, but the other side was a gulley; it was deep.

Q. I think you said something about gravel?

A. The gravel was on the right-hand side of the shoulder.

Q. And if you could have gotten on the right-hand shoulder, tell us the effect.

A. If I could get on to the gravel, I could brake

(Testimony of John A. Duff.)

the car better because the gravel would slow me down a little bit.

Q. Did you observe any lights on the tow wrecker? A. You mean Mr. Page's?

Q. Yes. A. No lights on his.

Q. Did you see any flagmen at the top of the hill, or any flares or signs or anything like that, before you got to the top? A. No sir.

Q. Or any place down the hill, did you see any of those things? A. No.

Q. Did you see anybody flagging traffic?

A. No sir.

Q. Could you tell us about how much you slowed down by reason of [223] your coming down the hill there when you started to slide, turn to the right? About what was your speed in comparison with ordinary when you came over the top of the hill?

A. I couldn't tell you exactly what my speed was.

Q. Did you look at your speedometer going down that hill at all? A. No sir.

Q. Your eyes were other places?

A. My eyes were other places.

Q. And, of course, during that period of time your automobile was moving down the hill?

A. Yes sir.

Q. After the accident—you have heard the testimony—you went to the hospital? A. Yes.

Q. And you went in the ambulance, I take it, with your wife? A. Yes.

Q. And you were in the hospital for a few days?

(Testimony of John A. Duff.)

A. Twelve days.

Q. And then what did you notice, just briefly, about any pains, bruises about your body, while you were in the hospital?

A. My chest hurt me. My chest hurt me and broke some ribs and my back hurt me.

Q. Was that on the left or right side of the back? A. Left, up towards the center.

Q. What area? That is what we might describe as the small of [224] the back?

A. Small of the back.

Q. By the time you got out of the hospital, how did your ribs feel—did they put anything around you at all?

A. Yes, I had one of those harnesses they put around me.

Q. Did they feel better by the time you left the hospital?

A. Yes, they felt a little better, not much.

Q. And then you went home, I take it?

A. Yes sir.

Q. Did you have your glasses with you the day the accident happened? A. Yes sir.

Q. Did you have glasses on? A. Yes sir.

Q. What kind were they, bi-focles or sun type?

A. Bi-focles.

Q. What kind of vision did you have with those glasses? A. Good vision.

Q. What happened to them? Did they get broken in the accident?

A. They got broken in the accident.

(Testimony of John A. Duff.)

Q. Were you cut about your head at all?

A. Just across here.

Q. Pointing to your left eyebrow and more or less the middle of your forehead?

A. About that. [225]

Q. Did you notice anything about your head aching anything like that after the accident?

A. Oh yes.

Q. About how long did that last?

A. Oh until about the time I left the hospital.

Q. And then you went home and then did you go back when your wife left the hospital and went by air ambulance?

A. Yes sir.

Q. And you went with her, I take it?

A. Yes sir.

Q. How long did that pain seem to persist, or do you still have some pain yet, or what is the condition? Briefly, more or less.

A. Well, my chest hurt me and my back hurt me for quite a while after it happened. It hurts me a little yet. My back and my chest hurts me a little bit; that is, if I do anything.

Q. What was your occupation before the accident?

A. I am a contractor and builder.

Q. What type of buildings?

A. Homes.

Q. Did you have any project, any home, under construction on December 31, 1954?

A. Yes sir.

Q. What was the stage of the house?

A. It just had the roof on and being enclosed.

(Testimony of John A. Duff.)

Q. Was it enclosed where you could proceed with your work? A. Oh yes. [226]

Q. And this was a vacation for you and your wife that you were going on? A. Yes sir.

Q. About how long did you plan on that?

A. Ten days or two weeks.

Q. To California and different places?

A. Yes sir.

Q. To see relatives?

A. Yes. I have a sister in Santa Rosa. I have a son down there and going to see her sister and her son and my stepson and my sister.

Q. About how long would it be before you get back to Burley?

A. We were coming back to Burley for ten days or two weeks.

Q. So you did have a project where you would work and contribute your services? In your work on your house, did you contribute any physical labor yourself? A. Yes sir.

Q. Tell us about that.

A. I worked and supervised the job.

Q. What kind of work would you do on that job?

A. Laying out the carpenter work too.

Q. Then did you resume, when you got out of the hospital, did you resume that project, go ahead with the construction, or what part did you do or didn't do there?

A. No, I didn't go ahead with it. [227]

Q. Why not? A. Because I wasn't able to.

(Testimony of John A. Duff.)

Q. And then did you later on go ahead with the house?

A. No, not for three or four months.

Q. And was that a period that you fixed more or less that you felt that you could have gone ahead with the work? In other words, I am trying to get your time element when you feel you could have gone back to work. Your ability.

A. No, I wasn't able to.

Q. How long did that situation last?

A. About three or four months, maybe a little longer.

Q. And can you tell us anything about the value of such type of work you were doing on the house before the accident?

Mr. Hanson: I object on the ground no foundation laid and not a proper element of damage to this man.

The Court: The Court seems a little bit confused at this point. Did you ask the witness when he went back to work, if he ever did?

Mr. Wright: I will ask that question.

Q. When, if you did, did you go back to work? When did you go back to work on that house, or do any kind of work?

A. I didn't go back to work on the house. I didn't have no men. I let my men go; I didn't go back to work.

Q. Did you do any other type of work after you went home from the hospital? [228]

A. No sir.

(Testimony of John A. Duff.)

Q. What type of physical work were you able to do at the time of the accident?

A. Carpenter work.

Q. And on that particular building would there be any work that you intended to do when you got back from this trip?

A. Yes sir, I intended to finish it.

Q. Would there be any physical work for you to do?

A. I had to finish laying out. I had two men and I work with them because I always work with my men.

Q. Are you acquainted with the different wage scales in Burley, Idaho?

A. Yes sir.

Q. And can you tell us what would be the scale for a person laying out work and doing physical work like you were doing before the accident?

Mr. Hanson: I am going to object on the same ground, no foundation laid to show that he was getting any salary. Was he getting a salary or drawing a salary and the books, of course, are the best evidence.

The Court: As I say, I am still confused.

Mr. Wright: I will let that phase go until after recess and we can take it up and save time of the jury, if the Court please.

Q. Now your automobile, what color was your automobile? [229]

A. Mine has a white top and real light green.

Q. If I show you a picture of it, would you recognize the condition after you saw it?

(Testimony of John A. Duff.)

A. Yes sir.

Q. Where did you see your car next?

A. Burley, Idaho.

Q. And did you, at your request, have it towed?

A. Yes sir.

Q. It was towed from where?

A. From Wells, Nevada to Burley.

Q. And what motor company or tow man did that?

A. Bronk Motor Company.

Q. And you have bills for that?

A. Yes sir.

Q. Did you have your car repaired?

A. Yes sir.

Q. What kind of a car was it? Give a more specific description of it with reference to model and the type and name?

A. Mine was Fireflight De Soto.

Q. Two or four-door sedan?

A. Four-door sedan.

Q. I suppose it had the extra tire?

A. Yes sir.

Q. And did it have a radio?

A. No sir, no radio. [230]

Q. It had a heater? A. Had a heater.

Q. What was the cost price of such a vehicle in December, 1954—'55 car? A. \$3400.

Q. Did you have it repaired after the accident?

A. Yes sir.

Q. Where? A. Bronk Motor Company.

Q. You have the repair bills?

A. Yes sir.

(Testimony of John A. Duff.)

Q. And has that been paid? A. Yes sir.

Q. And who paid the repair bill?

A. I did.

Q. Do you have cancelled check for that?

A. Yes sir.

Q. How about the Bronk Motor Company, have you paid the Bronk Motor Company for the towage? A. Yes sir.

Q. And you have those bills? A. Yes sir.

Q. With reference to Mrs. Jennie Duff, did you pay certain bills on Mrs. Duff's behalf?

A. Yes sir. [231]

Q. And the payment was made out of what kind of an account?

A. My wife and I have a joint account together.

Q. And it was paid out of the joint account?

A. Joint account.

Q. Then you have those bills? A. Yes sir.

Q. Why did you pay them, rather than Mrs. Duff issue the checks?

A. Well, I issued the checks because she was in the hospital and wasn't able to. She and I do business together, so I generally write the checks.

Q. Now what was Mrs. Duff's condition before this accident, with reference to taking care of the home? Did she hire any work done? How much work did you have to hire before the accident, please?

The Court: This may be a good place to interrupt counsel.

Jury admonished and noon recess taken at 12:00 o'clock.

Afternoon Session—November 14, 1954

1:30 p.m.

Presence of the jury stipulated.

Mr. Wright: If the Court please, counsel for the defendant and counsel for the plaintiffs have stipulated that the following items were incurred by the respective plaintiffs I will name, as a result of this collision. The defendant does not stipulate that he is liable for them, but if the respective people who did the work or doctors appeared, they would testify [232] that the charges were reasonable. With reference to Mr. John A. Duff, paid Dr. Charles A. Trehune \$10.00, for examination on June 7th; a receipt for payment by Mr. John A. Duff to Bronk Motor Company on 1-17-55 of towage and storage at the Page Garage and from the scene of the accident and to Burley, \$79.79; also charge of gas to John Duff that was used in the wrecker, towing from Wells to Burley, \$5.38; and also a repair bill to John Duff from the Bronk Motor Company, showing a total of parts, labor and material of \$2059.57, and I would like to introduce these in evidence, pursuant to the stipulation, if the Court please.

The Court: The offer may be received in evidence and marked as one exhibit, No. 18.

Mr. Wright: Also, if the Court please, the following under the same stipulation, for John A. Duff: Elko Clinic, \$80.00; Elko General Hospital, \$215.60; one pair of glasses, \$46.00.

Now with reference to Jennie R. Duff, if the Court please, the following are stipulated, that they were incurred as a result of this collision and that the respective people, if called, would testify that it was a reasonable charge.

Mr. Pike: I do not know about the first part.

Mr. Wright: What is the stipulation?

Mr. Pike: The same thing as we said as to John A. Duff, that we do not stipulate we are liable for these bills.

Mr. Wright: And you do not stipulate to liability? [233]

Mr. Pike: No.

Mr. Wright: These are all Jennie R. Duff: Elko Clinic, \$334.50; Elko General Hospital, \$431.05; and in addition thereto one-third of the ambulance from the scene to Elko, \$11.67; air ambulance from Elko to Burley, \$70.00; medicines and drugs, Miller Drug Company in Burley, \$56.50; Mrs. Hardy Sprague, housekeeper, \$22.00; Mrs. Arthur Gordon, housekeeper, \$167.50; additional item of Mrs. Gordon, \$16.00 for the same purpose; Dr. C. R. Kern, Jr., Elko, anesthetist, \$15.00; Dr. C. M. and E. H. Elmore, Burley, the joint doctor, \$12.00; Dr. O. W. Keen, Burley, \$9.00; the Cottage Hospital in Burley for X-rays taken, \$77.50; the Chester Artificial Limb and Brace Company, Boise, \$90.00; the bill of Dr. H. Terhune to November 5, 1955, \$250.00; travel expenses by automobile from Burley, Idaho to Boise to get the back brace, \$26.00.

In that connection, if the Court please, they could

probably all be stapled together and I would like to offer them for Mrs. Jennie R. Duff.

The Court: They will be received as one exhibit and marked Exhibit 19.

Mr. Wright: Then for Mr. John A. Duff, there would be one-third of the \$35.00 ambulance charge, \$11.66. I think, if the Court please, we were at the stage of asking Mr. Duff what work or household services Mrs. Duff performed before the accident.

MR. DUFF

resumed the witness stand on further [234]

Direct Examination

Q. (By Mr. Wright): Mr. Duff, at the time of the accident, were you and Mrs. Duff living together as husband and wife? A. Yes sir.

Q. How long had you been married?

A. Been married nearly 17 years.

Q. And you lived together during this entire period of time? A. Yes sir.

Q. At the time of the accident, and prior thereto, were you living in a home in Burley, Idaho? A. Yes sir.

Q. Did you folks own that home?

A. Yes sir.

Q. What work or services did your wife do in connection with the home, the meals and those other things about keeping house?

A. She done all of the work and cleaning the house and washing and everything that is done in the house.

Q. Did you send out any laundry before the col-

(Testimony of John A. Duff.)

lision? A. No sir, only suits to be pressed.

Q. Cleaning? A. Yes.

Q. After the accident, after she got home, what housework did she do?

A. After we got home——

Mr. Wright: I think, if the Court please, Mrs. Duff [235] has testified to that, so I won't go into it. I believe that is all the questions, if the Court please.

Cross Examination

Q. (By Mr. Hanson): Mr. Duff, will you agree with the general statement that it was about 4/10ths of a mile from the top of that hill where the accident occurred? A. Yes sir.

Q. And you could see that distance without difficulty, couldn't you? A. Yes sir.

Q. In fact, on that day you could see from one to two miles, except for natural terrain changes, hills or natural low places in the road, could you not?

A. Well, I don't know for two or three miles.

Q. I say one to two miles.

A. I couldn't swear to two miles.

Q. There wasn't anything in the atmosphere itself to inhibit your attention as you drove along, was there? A. No.

Q. And as you came over the top of this crest, you saw this car and orange trailer about the same time you saw the truck coming up the hill, didn't you? A. About.

(Testimony of John A. Duff.)

Q. And at the time you saw the truck and car, you were on that glassy ice at that time, weren't you? [236] A. Yes.

Q. Now so far as the truck was concerned, you weren't worried about that particularly at that time, were you? A. Well, a little.

Q. The truck was on its own side of the road?

A. It was on its own side of the road.

Q. And you were on your side?

A. I was on my side.

Q. And when you saw this car off the highway and this orange trailer, you knew an accident of some kind had happened, didn't you?

A. Yes, some kind of accident.

Q. Do you recall testifying at the hearing in Elko April, 1954, that you were not worried or not concerned about the truck as you came over that hill? A. No, I don't.

Q. Perhaps I could help you on that. I realize, Mr. Duff, sometimes as time goes on it is hard to remember all these things, and that is on page 226, starting about line 1, and the question is " * * * and approached the truck and passed the truck approaching your car? A. Yes sir. Q. Then you had no worry about the truck that was coming up towards you? A. No sir. Q. You weren't concerned with that because you saw he was on his side of the highway? A. I was on my side of the highway and he was on his side." Did you so testify in Elko at that [237] time?

A. I guess I must have.

(Testimony of John A. Duff.)

Q. Well, that is true, isn't it? A. Yes.

Q. Sure. You could see beyond that truck and you could see down where this car was, this orange trailer, and you knew at that time, as you testified a minute ago, that something had happened down there? A. Yes.

Q. And you intended to stop down there too, didn't you? A. Yes.

Q. As a matter of fact, as you got at that ice, you couldn't apply your brakes without going into a spin at that point? A. No sir.

Q. How fast were you going as you came over that crest, would you say?

A. About forty-five miles.

Q. Were you going any faster than that?

A. No. I didn't look at my speedometer.

Q. Could you have been going 45 to 50, or maybe even a little faster than that? A. No.

Q. Did you testify at this same hearing that you were going 45 miles an hour or better? [238]

A. About 45.

Q. Forty-five or better, forty-five to fifty?

A. Around that. I don't remember what I testified. I think 45 miles an hour.

Q. You could have been going a little faster than 45?

A. I might have been and might not.

Q. You didn't decrease the speed of your car when you went over that hill, other than letting up on the gas? A. Gas and applied my brakes.

(Testimony of John A. Duff.)

Q. In fact, you were still going at a pretty good rate when you hit that wrecker, weren't you?

A. No, I don't think so. I don't think I was going fast.

Q. The total repair on your car was \$2059.57, is that right? A. Correct.

Q. Can you describe for us generally just what damage was? A. What the damage was?

Q. Just describe the appearance of the car after the accident.

A. The left-hand side of the frame of the front appeared to hit there and pushed it over sideways to the right.

Q. And then how far did your car travel? Go ahead, excuse me.

A. It hit the door and glanced toward the rear fender. The right-hand side of the car wasn't hurt at all, the front part.

Q. Was there places on the door where it came in contact with the wrecker that was damaged or knocked in?

A. It was pushed over, yes sir. [239]

Q. What about the steering wheel itself, was that bent or damaged in any way?

A. Yes sir.

Q. What about the door panel and the left front fender, that part of your car, was that damages pretty badly, or damaged?

A. The panel of the door, you mean?

Q. Yes. A. Yes sir.

Q. In fact, the damage was quite extensive,

(Testimony of John A. Duff.)

wasn't it? A. Yes sir.

Q. For two thousand dollars you would have to have quite a bit of damage there?

A. Well, they put a new clutch in.

Q. Was it damaged that badly?

A. That's right.

Q. When your car struck the wrecker, how far did it knock the wrecker?

A. Well, that is something I can't tell you. I don't know how far.

Q. You say it was icy at the point where the impact occurred? A. Yes sir.

Q. And having in mind that ice and the damage done to your car, you still think you were doing less than 45 at the time the impact occurred?

A. Yes sir. [240]

Q. Do you know how far your car traveled after the impact?

A. No sir, I couldn't tell you that.

Q. Now when you left your home that morning, I think you told us you left about ten minutes to six? A. Yes sir.

Q. Where was the first place that you realized there was ice or snow on the highway?

A. Between Rogerson and the Nevada line.

Q. Did you stop at Twin Falls on your way to Wells? A. Yes sir, we stopped there.

Q. Did you find any more ice or snow from Rogerson on to Wells on the highway?

A. No, no ice. Found some snow because it was snowing.

(Testimony of John A. Duff.)

Q. Did that make the highway slippery where the snow was?

A. No, the highway wasn't slippery.

Q. When you got to Wells I think you told us the snow was melting, more slush?

A. Yes, when we come over the hill out of Wells it began to get soft and down in Wells it was slush.

Q. And then you say the highway was drier when you started up towards the place where the accident happened?

A. Yes sir.

Q. But there were icy spots here and there?

A. After we got on the hill out of Wells, from there on just icy spots. The farther we got, the drier the highway. [241]

Q. But there were little icy spots, as you say, as you proceeded on to where the impact occurred?

A. After we got over the crest.

Q. After you left Wells and before you got to the crest of the hill, immediately east of the scene, there were little icy spots along the highway in places, were there not?

A. Not very much, some, yes sir.

Q. When you saw little icy spots, did it occur to you that you might run into longer icy spots or more dangerous spots along that highway?

A. I thought the highway was getting better all the time from there because we got out of the snow-storm.

Q. You had lived in Idaho how many years before the accident happened?

A. Quite a few years.

(Testimony of John A. Duff.)

Q. Eighteen years, is that about right?

A. Yes.

Q. And you had driven in all types of weather, I suppose?

A. Yes sir.

Q. In the winter time?

A. Yes sir.

Q. And in your business, contracting business, you had occasion to drive when there was ice on the highway, have you not?

A. Yes sir.

Q. Did you ever drive up to Shoshone in the wintertime from [242] Burley?

A. No sir.

Q. Ever drive up to Malta, Graville, in the wintertime?

A. I don't know.

Q. Ever drive to Twin Falls?

A. Yes sir.

Q. And there are places along that highway where you run into slippery areas where there is ice on the road along the highway?

A. Yes sir.

Q. You know in this western country that conditions can change very often as you go along?

A. Yes sir.

Q. You knew at that time, in driving along this road, this range country, you might suddenly come to a slick spot, didn't you?

A. Well, not exactly.

Q. Well, did you think about that at the time?

A. No, I didn't. I thought the highway was good after we got out of Elko. I have traveled that road once or twice.

Q. You tell us you knew the highway after you got out of Elko and traveled it once or twice?

A. I don't know how many times.

(Testimony of John A. Duff.)

Q. But you had snow, these little spots, after you left Wells? A. Yes.

Q. And have you had to drive from Twin Falls down through Idaho traveling through snow? [243]

A. No.

Q. And on December 31, 1954, did it occur to you when you came over one of these rises you might hit a shady or icy spot?

A. No sir, it did not.

Q. As you came up this hill, did you decrease the speed of your car immediately east of the accident? A. No sir.

Q. You couldn't see over the top of the hill?

A. No sir.

Q. As you came up over that hill, not decreasing your speed, you didn't know what you were going to see on the other side, did you?

A. No sir.

Q. By the time you saw this car, this trailer, you were on the ice and going too fast to stop, weren't you? A. I couldn't stop.

Q. How long had you had this car before you left Burley? A. I got it Christmas Eve.

Q. About how much mileage would you say you had on it when you left Burley?

A. Around 200 miles, somewhere in that neighborhood.

Q. How far was it from Burley to where the accident happened, from your home?

A. Well, 46 miles to Twin Falls, say 110 miles to Wells from Twin Falls to Wells, and then 14

(Testimony of John A. Duff.)

miles, somewhere in that neighborhood, [244] west of Wells where I had the accident.

Q. In other words, you would say the mileage is somewhere over 400?

A. Four hundred twenty-seven.

Q. Would that be about right in your estimation?

A. Right around 427.

Q. This was a fluid drive car?

A. Yes sir.

Q. And you knew that at the time, of course, did you not, because you had been driving it since Christmas time?

A. Yes.

Q. And you know fluid drive cars are more difficult to perform sometimes on ice?

A. Sometimes.

Q. You say when you first saw this wrecker, it occurred to you if you went down on the right-hand side, between the wrecker and the orange trailer, you might get in the gravel there and slow up your speed?

A. I turned to the right-hand to get off the highway on the gravel shoulder on the north.

Q. Does that gravel shoulder extend all the way down from the crest of the hill?

A. I imagine it does.

Q. So if you had seen this wrecker at the same time you saw the car and orange trailer, you could have gone over that gravel [245] shoulder and sort of slowed yourself up?

A. Not very much.

Q. But you intended to stop, of course, as soon as you saw this wrecker out there, as an emergency?

(Testimony of John A. Duff.)

A. Yes sir, trying to stop.

Q. When you came down here to Carson City, did you drive your automobile, when you came down for the trial? A. Mr. Bedko drove it.

Q. And you all came together in the automobile?

A. Yes sir.

Q. Mrs. Bronson too?

A. No, Mrs. Bronson didn't come.

Q. And you stopped in Elko, I suppose, on your way down? A. Yes sir.

Q. And Mrs. Duff came in the car?

A. Yes sir.

Q. She was able to make the ride in the car without any difficulty?

A. Well, we stopped when she got tired.

Mr. Hanson: I think that is all.

Redirect Examination

Q. (By Mr. Wright): Do you remember, Mr. Duff, you got into Elko on a Thursday, on your way down to the trial? A. This last time?

Q. Yes. [246] A. Yes sir.

Q. Do you recall seeing me there that day at the hotel? A. Yes sir, Commercial Hotel.

Q. Where was Mrs. Duff at that time?

A. She was at the hotel.

Q. What part of the hotel?

A. We were——

Q. I mean, what was she doing, in the room or down in the lobby or where?

A. I believe she was in the room.

(Testimony of John A. Duff.)

Q. What was she doing?

A. She was resting.

Q. What part of the room did she occupy?

A. She was sitting on the chair and I was in bed.

Q. Now with reference to the type of day, tell us about the sun there, with reference to the sky, sunlight or what was the condition?

A. When we arrived there?

Q. Yes, going down the hill in that area, what was the condition?

A. The sun was shining and the roads were good and dry.

Q. And where the accident happened, was the sun shining? A. Yes sir.

Q. I mean the day the accident occurred and you were proceeding from Wells coming to the scene, that 14 miles stretch.

A. Oh, the day of the accident? [247]

Q. Yes. A. Oh, it was cloudy and hazy.

Q. Tell us more about the type of clouds? What type of clouds? A. You mean the color of them?

Q. Well, no, as to whether—I don't want to ask any leading question. There are different types of clouds, are there not? A. Yes, sir.

Q. How would you describe the clouds on that day? A. They were light snow clouds.

Q. I think you said you thought the road was good when you left Elko, I believe that is your testimony on cross-examination. And you arrived at Elko, or did you mean Wells? You said in your

(Testimony of John A. Duff.)

answer to one of the questions you thought the road was good when you left Elko, before the accident occurred. Did you mean Elko or Wells?

A. Wells.

Q. Now before you arrived, that is, from Wells to the crest of this particular hill, did you go down any hills, or did you go over any hills before you arrived at that particular crest?

A. Yes, sir, we went over the rise, went up and down.

Q. What did you notice as to those other crests, before you arrived at this crest which was the crest just before the accident?

A. The road was good.

Q. How about where you went down the westward slope, what was [248] the condition before you arrived at this particular crest?

A. They were good.

Q. From Twin Falls to Wells you said was 110 miles. Can you tell us what distance it is from Contact to the State line of Idaho-Nevada to Wells?

A. The distance?

Q. Yes.

A. Well, a lot of them claim it is just about half way between Twin Falls and Wells; that would be approximately about 50 or 55 miles, somewhere in that distance.

Mr. Wright: No further questions.

(Witness excused.)

Mr. Wright: If the Court please, the plaintiffs rest.

The Court: The record will show that the plaintiffs rest their case.

CLIFFORD ELTON

a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hanson): State your name, please?

A. Clifford Elton.

Q. Where do you live, Mr. Elton?

A. Wells, Nevada.

Q. What is your occupation? A. Mechanic.

Q. Do you know Mr. Page? [249] A. Yes.

Q. You married his daughter, did you?

A. Yes.

Q. Directing your attention to December 31, 1954, do you recall an accident involving the Page wrecker and DeSoto automobile about 14 miles west of Wells? A. Yes.

Q. Were you out there at the scene that day?

A. Yes.

Q. Do you recall the time you got the call there in the Page garage, notice of the accident?

A. Around 8:30.

Q. What time did you leave Wells?

A. Two or three minutes after.

Q. Who went out to the scene with you?

A. Mr. Page, myself and Leonard Jewell.

Q. Where is Leonard Jewell at the present time?

A. In Oregon.

Q. How old is he? A. Fourteen.

(Testimony of Clifford Elton.)

Q. How about road conditions between Wells and the crest of the hill immediately east of where the accident happened? A. They were slushy.

Q. What about the area of the highway from the crest of the hill on down to where the Shaw car was? [250] A. That was slushy also.

Q. Tell the Court and jury what you saw as you came over the crest of the hill travelling west?

A. Well, there was a car and trailer off on the right-hand side of the road, coming down the hill.

Q. What did you do, what did you people do with the wrecker when you arrived at the scene?

A. Well, we parked the wrecker off the side of the road and looked the car and trailer over to decide what would be the best way to get it up.

Q. Do you recall at that time whether or not there were any signal lights burning on the wrecker?

A. Yes, there was a red light.

Q. Is that the dome light?

A. It is the light on top of the cab of the wrecker.

Q. What did you do after that, so far as the wrecker was concerned?

A. We got the wrecker in position to get the trailer back on its wheels.

Q. And when you say "position," where was the wrecker when you got it in that position?

A. Well, it was facing—would be facing east by south, back in on the shoulder of the road, toward the trailer.

Q. Did you turn the trailer up on its wheels?

(Testimony of Clifford Elton.)

A. Yes. [251].

Q. On which side was the trailer laying when you first got there?

A. It would be on the right-hand side.

Q. Just tell us what you did to get it turned up on its wheels.

A. Well, we just unloosened the cable and pulled out and we got it back on its wheels.

Q. After you got it back on its wheels, with reference to the wrecker, where was the trailer, so far as the position of the two vehicles were concerned?

A. It would be almost immediately behind the wrecker.

Q. The trailer was? A. Yes.

Q. Do you have any estimate how far it was behind the wrecker at that time?

A. Probably three feet.

Q. Did you see the Duff car before it collided with the wrecker? A. No, I didn't.

Q. What were you doing just before that collision occurred?

A. Unhooking the trailer from the car.

Q. Were you hit by any of the vehicles following the impact?

A. I believe I was hit by something; I couldn't say for sure.

Q. What was your first notice of the accident?

A. Leonard Jewell called a warning. I don't know what he said, "Look out.", or something. [252]

Q. After you had collected yourself, following the impact, can you tell us about where the different

(Testimony of Clifford Elton.)

vehicles were, following the impact, between the Duff and Page wrecker, where they were with reference to each other?

A. Well, the car was farther down in the barrow pit and the trailer was shoved into the car and the DeSoto was on the right-hand shoulder of the road. I don't believe any of them were actually in the barrow pit. Two right wheels may have been just over the shoulder of the road, and the wrecker was skidded down the highway and facing, I would say, almost parallel.

Q. That is, the front edge of the wrecker would be facing towards the east?

A. Would be east, yes.

Q. Did you make any observations whether or not the impact had knocked the wrecker any distance? A. Well, it would have had to, yes.

Q. Just tell what you saw, if you remember making any observation about it.

A. Well, I wouldn't know how many feet, but the rear end would have had to have been knocked clear around.

Q. Was there any traffic on this highway before this accident between the Duff car and the wrecker car? A. Yes.

Q. Did you observe any other cars going past the wrecker before [253] that time?

A. Yes, there were cars.

Q. Where was the front end of the wrecker, with reference to the center of the hard surface part of the highway, before the collision happened?

(Testimony of Clifford Elton.)

A. I would say probably five feet to the right of the center.

Q. That would be to the north of the center line?

A. That would be to the north.

Q. Those cars you saw go past before the impact, did any of those cars have difficulty in going around the wrecker and passing it?

A. Not to my knowledge.

Q. What about the area of the surface of the highway where the impact occurred? Can you describe that as it appeared to you at the time, as the wrecker came down, immediately to the east of where the impact was?

A. Well, I wouldn't know exactly, but there were a lot of places where you could see the highway. The highway was wet, slush.

Q. Would that be immediately east of where the collision happened?

A. Well, I would say yes.

Q. What was the color of the wrecker before this impact occurred?

A. Two-tone, dark blue and lighter blue.

Q. What part is the darker blue? [254]

A. The bottom portion.

Q. And what color is the top portion?

A. Light blue, the top.

Mr. Hanson: Your witness.

Cross Examination

Q. (By Mr. Taber): Mr. Page is your father-in-law? A. Yes.

(Testimony of Clifford Elton.)

Q. How long have you been employed by him?

A. I was employed about one year.

Q. At the time—— A. Before the accident.

Q. You had been employed by him about a year?

A. Yes.

Q. You were an employee of his on December 31, 1954, isn't that true? A. Yes.

Q. And in going out there in answer to this call, you were working for Mr. Page, is that true?

A. Yes.

Q. In fact, that was part of your duties, to answer these calls with the wrecker, isn't that right?

A. Yes.

Q. Now you say that Mr. Page's Studebaker wrecker was a two-tone blue color? A. Yes.

Q. And the dark blue was toward the bottom of the vehicle? A. Yes.

Q. And the light blue toward the top, is that right? A. Yes.

Q. I show you plaintiffs' Exhibit 5, plaintiffs' Exhibit 4, plaintiffs' Exhibit 7 and plaintiffs' Exhibit 6, and ask you to examine those photographs. Do you recognize the vehicle which is shown in all those photographs, Mr. Elton? A. Yes.

Q. Whose vehicle is it?

A. It is the Page Garage wrecker.

Q. Do you recall when those photographs were taken? A. No, I don't.

Q. Can you tell, by examining the photographs, when the photographs were taken?

(Testimony of Clifford Elton.)

A. Well, they should have been taken shortly after the wreck.

Q. And do these pictures show the dark color blue—I am referring now to plaintiffs' Exhibit 4—does plaintiffs' Exhibit 4 show the dark blue of the Page wrecker?

Mr. Hanson: I think the picture speaks for itself.

Mr. Taber: I will withdraw the question.

Q. Would you point out to me, and to the members of the jury, on plaintiffs' Exhibit 4 just what portion of the Page truck was the dark portion?

A. Yes, from this line down is much darker blue than that portion. [256]

Q. And what portion, referring again to plaintiffs' Exhibit 4, was a light blue?

A. From the line just below up on top.

Q. Where did Mr. Page store this wrecker, Mr. Elton, where did he keep it? A. In the garage.

Q. And he kept it there at all times?

A. Except during the day it was parked outside.

Q. And where did he park it outside the garage?

A. Usually directly across the street.

Q. Was that true for the year preceding December 31, 1954?

A. Well, generally, yes. It wasn't a standing order that it be parked there, but normally it was.

Q. The greater portion of that year preceding December 31, 1954, the car or wrecker was outside the garage in the daytime and it was moved into the garage at night, isn't that true? A. Yes.

Q. Now you say there was other traffic on the

(Testimony of Clifford Elton.)

highway before you arrived at the scene where the U-Haul trailer and the other car were off the road?

A. Yes.

Q. Approximately how many cars went by the scene there from the time you arrived until the collision occurred?

A. Well, I wouldn't know. There were several.

Q. Well, would that be one or two, or approximately how many?

A. There were more than that. I didn't count them, but there must have been ten at least.

Q. There were ten at least? A. Yes.

Q. And you say that those other cars had no difficulty in getting by the place where the wrecker was parked on the highway? A. No.

Q. What were you doing at the time these other cars went by?

A. Well, inspecting the situation, the trailer and car, to see how the best way would be to right the trailer, put it up on its wheels.

Q. From the time you arrived until the collision occurred, as a matter of fact, Mr. Elton, you were busy engaged in trying to right this U-Haul trailer, to put it back on its wheels, isn't that true?

A. After we had looked at it.

Q. You recall arriving out here at the scene of this collision do you not? A. Yes.

Q. About what time was that?

A. Around nine o'clock, I think.

Q. And what time did the collision occur?

A. Possibly 9:30. [258]

(Testimony of Clifford Elton.)

Q. So that for a half hour you were busily engaged, were you not, in servicing the U-Haul trailer in the barrow pit and in putting the wrecker into position on the highway, isn't that true?

A. Yes.

Q. And in attaching the cable to the U-Haul trailer, so that you could right it, put it back on its wheels? A. Yes.

Q. And at the time the collision occurred, you had succeeded, had you not, Mr. Elton, in righting the U-Haul trailer? A. Yes.

Q. So it took you about a half hour to accomplish that job, isn't that true? A. Yes.

Q. Who assisted you in that work?

A. Mr. Page.

Q. How did he assist you?

A. Well, by giving instructions, more or less supervising.

Q. In other words, Mr. Page told you how to perform the job, isn't that true? A. Yes.

Q. And he told you to place the wrecker in the position that you placed it, isn't that true?

A. I don't know if he said in so many words to put it exactly there, but it was agreed the way we done it was the way we did. [259]

Q. When you first arrived out there, you parked the wrecker on the shoulder of the road, if I understand your testimony? A. Yes.

Q. In other words, parking it in a position near the U-Haul trailer, isn't that true? A. Yes.

Q. From that position, let me ask you if the

(Testimony of Clifford Elton.)

boom of that wrecker would extend out and over where the U-Haul trailer was situated?

A. Yes.

Q. And you used a cable on the boom and a winch, isn't that true? A. Yes.

Q. You attached it to the U-Haul trailer in order to right it, bring it back on its wheels? A. Yes.

Q. Now from the position, when you first drew up there on the shoulder of the highway, couldn't you have righted the U-Haul trailer from that position?

A. I don't know if we could have lifted it.

Q. You think it could have been done that way?

A. Well, I would say it was possible; I don't know.

Q. You didn't try to? A. No.

Q. Now you had proceeded to the point of merely putting the [259-A] U-Haul trailer back on its wheels when this collision occurred, isn't that true?

A. Yes.

Q. You were engaged most of the time in doing that work, from the time you arrived until the collision occurred, is that true? A. Yes.

Q. Now you say there were other cars that went by the scene and had no difficulty in going past the wrecker. Did you watch them?

A. No, I can't say I did.

Q. How can you tell us, then, that these other cars had no difficulty in going past the wrecker?

A. I believe I said they had no difficulty to my knowledge.

(Testimony of Clifford Elton.)

Q. Did you watch them as they went by?

A. No.

Q. Did you watch cars from the crest of the hill east of where this collision occurred and they proceeded in a westerly direction down the hill?

A. After we arrived, no.

Q. Did you watch cars as they proceeded in an easterly direction, past the scene of where this collision occurred?

A. No, only while we were travelling down the hill ourselves.

Q. Were there any trucks that went by?

A. I couldn't say for sure.

Q. But you didn't watch these other cars, if I understand you [260] correctly, and you told us the other cars had no difficulty in getting by, is that true?

A. To my knowledge they didn't.

Q. Now if I understand you correctly, it took approximately a half hour to put the U-Haul trailer back on its wheels?

A. Yes.

Q. And during that time where was the wrecker on the highway?

A. Well, it was back facing in a southeast direction. It was about five feet from the right of the center line, I guess.

Q. When you say five feet to the right of the center line, you mean that the front end of the wrecker was approximately five feet north of the center line, is that true?

A. Yes.

Q. What is the actual length of that wrecker, Mr. Elton?

(Testimony of Clifford Elton.)

A. I don't know. I have to guess—between, close to 20 feet.

Q. At what sort of an angle was that wrecker placed across the west-bound lane of traffic?

A. Well, I don't know what the degree of angle would be, but the rear end of the wrecker was out on the shoulder, with the front end upon the highway.

Q. You are unable to tell us anything about the angle that pointed across the highway? A. No.

Q. After you arrived, did you determine why this car and trailer were off the road? What caused the car and trailer to be off [261] the road?

A. Well, I assumed it was slippery roads.

Q. Who drove the Studebaker wrecker truck from Wells out to the scene of where this collision took place? A. I did.

Q. And you say that Mr. Page and his grandson were also in the wrecker? A. Yes.

Q. And as you drove then, I assume, that the boy sat in the middle and Mr. Page on the outside, is that true? A. Yes.

Q. Did you have chains on the Studebaker wrecker? A. No.

Q. How fast did you drive from Wells out to the place where the car and the U-Haul trailer were off the road?

A. Probably around 30 or 35 miles.

Q. And what was the condition of the road from Wells to the crest of the hill just east of where you found the U-Haul trailer?

(Testimony of Clifford Elton.)

A. They were slushy, wet.

Q. And would you say that it was slushy all the way from Wells to that point?

A. Well, I believe it was more slippery and more snow back in Wells. As we proceeded west, there were a lot of bare wet spots on the highway, slush.

Q. And were there any dry spots on the road?

A. No.

Q. No dry spots? A. No.

Q. So that the road from Wells, out to the crest of this hill, was slushy and wet? A. Yes.

Q. There were no dry spots?

A. Not to my knowledge.

Q. Did you know that that wrecker was equipped with two signs approximately 20 x 30, white with red lettering, which read, "Danger," "Look ahead"?

A. Yes.

Q. Did you know that the wrecker was equipped with six flares of the kerosene burning type?

A. Yes.

Q. Did you know that the wrecker was equipped with four flares of the reflector type? A. Yes.

Q. Now what was the condition of the road, Mr. Elton, from the crest of this hill down to where you found the U-Haul trailer?

A. Well, I would say wet and slushy.

Q. It was wet and slushy? A. Yes.

Q. And you went over it, then you determined that that road was wet and slushy, at approximately 9:30? [263]

A. Yes, shortly before that, I guess.

(Testimony of Clifford Elton.)

Q. Was there any change in the weather from 9:30 that morning until 10:00 o'clock that morning?

A. Not noticeable, I don't believe.

Q. That is, it didn't get colder or warmer?

A. Not noticeably, I don't believe.

Q. Was there any change in the weather from 10:00 o'clock to 10:30 that morning?

A. Well, I don't recall any drastic changes.

Q. What was the boy doing all this time, do you know, Mr. Elton? By the boy, referring to Leonard Jewell.

A. He was standing off to one side, just watching.

Q. Do you recognize this drawing on the blackboard? A. Yes.

Q. Are you oriented to this tape in the north bottom center? A. Yes.

Q. To your left would be west, to your right east? A. Yes.

Q. You say the boy stood around and watched?

A. Well, I would say he was to the right of the tape itself, back and north.

Q. To the right of the tape? A. Yes.

Q. Where is that?

A. That would be east of the tape.

Q. In this vicinity? [264]

A. Yes, a little farther north.

Q. Off the road? A. Yes.

Q. And he stood and watched, is that true?

A. Yes.

(Testimony of Clifford Elton.)

Q. Do you know what time, approximately, this collision took place?

A. I imagine shortly before ten.

Q. You arrived——

A. Probably between 9:30 and 10:00.

Q. You answered the call at 8:30 and you arrived at 9:30? A. Shortly after nine.

Q. So that during that one-half hour Leonard Jewell was around watching, you were busily engaged trying to right the U-Haul trailer and what was Mr. Page doing?

A. He was there supervising.

Q. I am going to ask you—maybe I have asked this question before; if I have, your Honor will excuse me—how long did it take you to get the U-Haul trailer back on to the wheels from the time you arrived at the scene?

A. Approximately a half hour.

Q. And after you had righted the U-Haul trailer, how long was it from that time until the collision occurred? A. Probably just a few minutes.

Q. Mr. Elton, would you mind stepping down here to the blackboard. [265] You say you are oriented to this diagram on the blackboard and draw in the position of the Studebaker wrecker truck of Mr. Page's after the collision between this other car and the wrecker.

A. Well, I would say it would be almost where this "1" is, approximately down here.

Mr. Hanson: You are referring to "W-1"?

(Testimony of Clifford Elton.)

Mr. Taber: Well, counsel has just taken the words out of my mouth.

A. This is after the impact?

Q. Yes.

A. I would say somewhere right about that position.

Q. And you have drawn a rectangle and you have indicated the point, indicating the direction in which the Page wrecker was facing, is that right?

A. Yes.

Q. Now with the consent of counsel, I will mark that "W-2", and suppose I indicate on this by heavy dash chalk marks, sort of perforated lines, is that agreeable?

Mr. Hanson: Agreeable.

Mr. Taber: That is all, thank you, Mr. Elton.

Redirect Examination

Q. (By Mr. Hanson): You have here a list of equipment the truck had. I wonder if you would object to writing the dimensions of the dome light?

Mr. Taber: Not at all. [266]

Q. Can you describe the dome light you say was blinking on top of the truck before the accident?

A. Well, it is mounted on top of the cab and it is approximately eight inches high and probably five inches in diameter, the blinker type.

Mr. Hanson: Would you mark the back of the photograph?

Mr. Wright: So stipulated. I would suggest that we not put the actual board in, but by stipula-

(Testimony of Clifford Elton.)

tion take the photograph and then put the photograph in; then mark the exhibit number on it. In other words, I won't stipulate the blackboard itself can go in evidence, only the photograph be taken.

The Court: Stipulated that the board, showing the present diagram, may be photographed and that photograph will be introduced in evidence as defendant's Exhibit B.

Mr. Taber: Let us have it plaintiffs' next in order.

The Court: Then that will be No. 20.

Q. Do you recall whether or not any time was spent examining the area where the Shaw car was before you attempted to upright the trailer?

A. Yes.

Q. And could you estimate about how much time it required for that inspection?

A. Probably about 20 minutes, I would say.

Mr. Hanson: I think that is all. [267]

Recross Examination

Q. (By Mr. Taber): Mr. Elton, how far would you say—having indicated on plaintiffs' Exhibit 20 the position of the wrecker after the collision—how far would you say the wrecker moved from the position indicated on plaintiffs' Exhibit 20 than it was prior to the collision?

A. In feet how many?

Q. Yes.

A. Well, the back end of the wrecker moved much farther than the front end.

(Testimony of Clifford Elton.)

Q. That is, the back end of the wrecker moved in a general southwest direction, did it not?

A. Yes.

Q. Sort of swinging around this way?

A. Yes.

Q. Again how far would it be from the position you have indicated where it came to rest after the collision and the position it was in prior to the collision?

A. I couldn't say.

Q. Could you give us how far approximately?

A. I would have to guess. Probably 15 or 20 feet.

Q. Would you say that the back end of the wrecker moved 15 to 20 feet in a southwest direction?

A. I would say the front end of the wrecker was approximately 15 to 20 feet west of where it was before the collision. [268]

Q. In other words, you want the jury to understand, then, that the distance between the wrecker, as you indicated, where I am now pointing as indicated where it was prior to the collision, and the position you have placed it after the collision, was 15 feet to the west?

A. Yes.

The Court: 15 to 20 did you say?

A. Yes, 15 to 20.

Q. Fifteen to 20?

A. Yes.

Mr. Taber: That's all.

(Witness excused.)

Jury admonished and recess taken at 2:45 until 3:00 o'clock.

3:00 P. M.

Presence of the jury stipulated.

Dr. Thomas K. Hood sworn and testified.

Dr. Harry B. Gilbert sworn and testified.

H. L. PAGE

the defendant, having been previously sworn, testified as follows:

Direct Examination

Q. (By Mr. Pike): Mr. Page, you previously testified that you acquired the wrecker involved in this accident during what year? A. 1941.

Q. Now between the time that you acquired the wrecker and the [269] time of the accident on December 31, 1954, had the wrecker been repainted at any time? A. Yes.

Q. And what time? A. 1951.

Q. And what was the occasion of that?

A. Gold leaf lettering on both sides of the wrecker began to sluff off and look bad and had to be repainted and relettered.

Q. At that time generally what was the condition of the blue paint? A. Good.

Q. Do you know whether or not there was any substance over the paint when you got the wrecker?

A. I didn't get the question.

(Question read.)

A. Yes, sir.

Q. What was it?

A. It was DuPont clear formation to keep the paint from sluffing off.

(Testimony of H. L. Page.)

Q. When the wrecker was repainted in 1951, was it painted a different color or colors, or the same?

A. Painted the same paint colors.

Q. And who did the repainting?

A. It was done at my shop.

Q. Were you familiar with how the paint that was used was [270] obtained? A. Yes, sir.

Q. How was that obtained?

A. The wrecker people, who painted the wrecker originally, gave me the paint number and the maker of the paint, so I could get the same paint whenever it was necessary to repaint it again. It was blue when it was painted in 1951, the same paint, made by the same people.

Q. And will you state whether or not there was any substance put over the paint after it was repainted in 1951?

A. Yes, sir, the same DuPont clear formation was put over to protect the paint and lettering, to keep it from fading.

Q. It was only repainted one time from the time you got it until the accident? A. Yes.

Q. That was in 1951? A. Yes.

Q. What was the condition of the paint after the wrecker was repainted in 1951 up to the time of the accident December, 1954? A. Good.

Q. I hand you these three photographs, which are marked defendant's Exhibit A, B, and C, and ask you if each of those photographs correctly depicts the Page wrecker as it appeared following re-

(Testimony of H. L. Page.)

painting which was done after the accident December, 1954?

A. Yes, sir. It is a little lighter in the picture.

Q. The photographs, of course, do not depict any color, only just black and white, but with that exception it shows generally the contrast in color?

A. Yes, sir.

Q. And those pictures were taken in daylight, in the vicinity of your garage at Wells, Nevada, rather recently, were they not?

A. Yes, sir.

Q. Mr. Page, when you approached the Shaw car, as it was off the north hand side of the road in the barrow pit, on the day of the accident, how long did it take you, approximately, to get the trailer righted, put back on its wheels, after you reached a conclusion as to the procedure which you were going to follow to accomplish that?

A. Five to seven minutes.

Q. And what would you have to say, by way of explanation, as to how the procedure followed by you, as being a proper procedure in that regard?

A. The wrecker——

Mr. Taber: We object. What is proper under circumstances out there on December 31, 1954, is governed by certain rules which your Honor is going to give to this jury and it is a question which they are ultimately going to decide. This question addressed to this defendant——

Mr. Pike: I will withdraw this question.

Q. What procedure did you follow, Mr. Page?

A. I followed the procedure that I was in-

(Testimony of H. L. Page.)

structed to follow by the people who built the wrecker. It is a special built wrecker, it isn't a standard wrecker, and it is also a special built truck, due to the fact that the wrecker that we built could not be mounted on any standard make of truck in the country and they had people go to school for three days' training by the engineers who built the wrecker and he taught me how to use it scientifically, and I was following those procedures in putting that trailer and car out on the road, without doing any damage to the vehicle. That was done before I arrived at the scene of the accident.

Q. Specifically, had you followed this procedure up to the point of having righted the trailer and putting it back on its wheels?

A. Yes, sir, I had.

Q. And you were in the process of uncoupling the trailer from the Shaw car at the time the car collided?

A. Yes, sir.

Mr. Taber: We will stipulate that the repair bill to the Page wrecker was the sum of \$1,040.97, but that includes \$144 tow bill from Wells to Salt Lake City.

Stipulated further that telephone calls in connection with the repair bill on the boom, \$13.18; for loss of repairs Mr. Page would have obtained, repair jobs, that sum is \$450, he would have obtained repair jobs by using the wrecker; doctor bills, \$30.50; travel to Elko, \$24.00.

Mr. Hanson: Travel to Elko was in connection with [273] doctor bill.

(Testimony of H. L. Page.)

Mr. Taber: Travel to Elko to see doctor, \$24.00; travel to Salt Lake City to get the wrecker, \$44.43, and that loss of profits from tow jobs that he would have obtained while the wrecker was being repaired is \$172.00.

We would also like the stipulation to show that parts supplied by Mr. Page for repair bill, included in the repair bill, are \$209.02. Do you have any objection to that?

Mr. Hanson: No.

Mr. Pike: There has been additional \$10.00 of Dr. Thomas Hood.

The Court: What is the total doctor bill now?

Mr. Pike: \$40.50. And also a \$31.00 x-ray.

Mr. Taber: X-rays, your Honor, \$21.50.

Mr. Pike: I think that covers special damages.

Q. Mr. Page, repairs to your wrecker were made in Salt Lake City?

A. They were made in Chattanooga, Tennessee.

Q. The wrecker itself was delivered to you originally in Chattanooga, Tennessee, wasn't it?

A. I went there and got it.

Q. After the accident December, 1954, where was your wrecker repaired so you could use it again?

A. Salt Lake City.

Q. Why was it sent to Salt Lake City?

A. There was no one over there could repair it.

Q. No one in Wells?

A. Or Elko, either one.

Q. In other words, Salt Lake City was the closest point you could have repairs made to it?

(Testimony of H. L. Page.)

A. Yes, sir.

Mr. Pike: That is all.

Cross Examination

Q. (By Mr. Wright): Mr. Page, I think you said you put your wrecker out on the highway pursuant to instructions given to you by the people who built the trailer? A. No, the wrecker.

Q. Built the wrecker; and that was pursuant to those instructions given to you at the time?

A. Proper procedure for doing a good job under the conditions that existed.

Q. When did you get the wrecker? A. 1941.

Q. In 1941, and December 31, 1954, the day of the accident, I understand you were following the same instructions as you got in 1941?

A. Exactly.

Q. Isn't it possible to have taken—first, I might ask you, you did drive up from Wells and you did stop on the shoulder somewhere in the vicinity of that trailer, did you not, pointing toward Elko?

A. That's right.

Q. This trailer that was attached to the Ford was very small, wasn't it?

A. Small trailer, about seven or eight feet long.

Q. But it was a small load?

A. About 36 inches high on the side, I think it was.

Q. About how much did it weigh with the load on?

A. Well, I don't know. The man himself that

(Testimony of H. L. Page.)

owned the trailer said he had about 1500 pounds on it.

Q. Did he say that was 800 pounds and the other a thousand?

A. Well, I asked how much a load it had on it and he said about 1500 pounds.

Q. This equipment that you had, you had power brakes, you could put on around three thousand pounds on all the different wheels? A. Yes.

Q. And then at times you even used it to tow great big semi-jobs, like these big companies?

A. Yes, sir.

Q. And you used it to pull cars from way down off the highway where it went down considerable distances? A. Yes.

Q. You had the ability to pull cars up from where they had gone over an embankment a considerable distance?

A. You mean with the wrecker?

Q. Yes, with the wrecker. [276]

A. With the boom driven or just the wrecker itself?

Q. With the winch up? A. Oh, yes.

Q. Now this little trailer that was tipped over on its right side, it didn't take very much of a pull to pull that up on the wheels, did it?

A. It took very little pull.

Q. Did you have the engine running when you did that? A. Sure.

Q. To get power on the boom lines? A. Yes.

Q. It wouldn't be similar to a job, some big

(Testimony of H. L. Page.)

semi-trailers like the PIE, wouldn't take that much?

A. No, the procedure would be entirely different.

Q. Now, isn't it possible that you could have put the wrecker on the shoulder, facing to the west, and put the boom and placed similar to that, hooked on to the trailer, tighten up your winch and thus pulled the trailer right up over on its wheels?

A. That would have been a possibility. It could have been done, provided you had carried out the other procedure.

Q. Well, the first thing you had to do was to put the trailer on its wheels? A. That is right.

Q. And you did park over on the shoulder when you drove up there, didn't you? [277]

A. That's right.

Q. Now as to pulling this little trailer back on the road, you could very easily have attached on the back end, with the front end of the wrecker facing toward Wells, with the booms swinging over and go right up on the highway towards Wells, couldn't you? A. No.

Q. And that was a very small vehicle, that trailer?

A. You must take into consideration the trailer was on its side.

Q. I mean after you put it on its wheels.

A. I didn't put it back on the bank.

Q. Did you put it on its wheels? A. Yes.

Q. You could have driven down to the west up where you turned around when you came back? You did turn around and come back? A. No.

(Testimony of H. L. Page.)

Q. How did you get the wrecker out of the highway? A. Turned around.

Q. On the road itself? A. Yes.

Q. You could have first put the trailer on its wheels and stayed over on the shoulder, couldn't you?

A. I could by running a cable, taking the other boom and swinging it in the opposite direction and putting at an angle and turned the wrecker there, but I would have created a hazard of cable going clear across the highway to the south. [278]

Q. Don't you have any braces on your wrecker, when you are parked parallel to the road and want to hold something off from the barrow pit, don't you have any braces that go on the shoulder up to that side of that cab?

A. In the first place, there is no wrecker built like that.

Q. I was asking you.

A. You are saying something that never existed.

Q. Don't you have, with your equipment, some braces to put from the ground up to the side of your wrecker?

A. I have an extension of the mast on both sides that goes down to the surface of the road. They are good up to a certain point of pull, that is to take the strain off of the frame of the wrecker. That is what they are for.

Q. In other words, you have some braces there used in connection with your wrecker, so that your wrecker itself, if you are pulling from the side,

(Testimony of H. L. Page.)

will not tip over? You would put some braces up so it will take the strain off?

A. The wrecker has two movements.

Mr. Pike: Let the record show Mr. Wright has handed to Mr. Page a toy wrecker and when you are talking about the Page wrecker, make that clear and when you are talking about this toy wrecker with one boom, make that clear.

A. The page wrecker has a mast—called a mast—steel mast that sets up here, with cross pieces on the top and braces in between like this to make it rigid, to keep it from twisting. It also [279] has braces coming from the top of the mast going across the top down to the back of the wrecker, clear forward to the boom, two of them, one on each side. They come to a point in back up this way, to keep it from twisting as much as possible, and this mast sits up in this position on the Page wrecker, is fastened to the frame and directly underneath at the bottom of the mast on each side there is a continuation with a steel plate about 10 inches in diameter, and it is on a ratchet that you can lower down when you are pulling something heavy or lifting something heavy, let it down, clear down to the highway. Comes right in underneath on both sides, to take the strain off of the mast itself, to keep it in alignment, but it is directly beneath the mast and inside of the frame of the truck. It is narrower than the frame itself, because the mast is mounted inside the frame, so it is quite narrow underneath. They are put there for the purpose of taking the

(Testimony of H. L. Page.)

strain off of the truck frame when pulling a heavy load from back or when necessity demands and you have a heavy piece of equipment on a mountainside in a canyon and it is necessary to block the highway temporarily, and you swing one boom around to the side. They can only go 180 degrees, those booms, that is all they can move, 180 degrees. You can swing a boom around here, let this brace down underneath the truck continuation of the mast on both sides. That makes the frame solid. There is no strain on the frame, it is all on the mast; and you take the other boom and swing it around in the opposite direction [280] and anchored. If the vehicle you are going to pull up is heavy, you have to put a block in the pull line. It has a three-eighths inch specially built cable, very flexible. If necessary you put one block or two blocks on the line you are going to pull the vehicle back up on the road with. The same thing applies for the pull line, because the pull line is no stronger than the anchor line. If you ran a straight cable back and anchored it, you have one block or two blocks on the pull line, the result would be you would break your anchor line and over would go your wrecker down in the canyon, or wherever you might be setting, and the same probably applies to the operation of that vehicle over there. I would have had to swing one boom around and with 1500 lift—those booms are 12 feet long—this other boom would have been just hanging over here. I would have had to go around in the opposite direction for

(Testimony of H. L. Page.)

safe position and put a cable across the highway. I have anchors, ground anchors, that I can pull up to 64 ton against it, anchor them right to the ground. I would have to swing it around and put my ground anchors out in order to have made it a safe operation in raising that kind of weight. I can raise a thousand pounds without putting an anchor and an anchor cable out or without turning the wrecker over. Anything over that, it can't be done, because your anchor pulls together, it will tip over, and that is why it would have been wrong procedure. To have righted the trailer by pulling up by the side of it, it would [281] have taken three or four times the length of time to have done the job that way, as it would the way I proceeded. I had already righted the trailer, the trailer was back up in that position. The wrecker was back up, back of the trailer, with these booms extending out approximately two feet beyond the back of the wrecker, which were over the trailer. I had raised the trailer, took the cable from the left boom of the wrecker, I took the cable from this boom here, and put it down to the lower side. It was turned over on its right, and put it back up on its wheels, but you couldn't pull it out that way, it would turn over again, so it was necessary to take the cable from the right boom and put the upper side of the trailer, the opposite side, and take the cable from the left boom to hold the trailer up, the wheels clear off the ground, in a level position, and use the two cables in moving the wrecker for-

(Testimony of H. L. Page.)

ward. I could have pulled the trailer right back on to the highway in an upright position that it wouldn't have turned over, and that is the only way to get it back on the highway.

Q. Mr. Page, after you hooked on to the little trailer and you put it on its wheels, then you took the cable that you had attached to the little trailer and it was taken off, wasn't that right?

A. Just merely unhooked from a chain.

Q. And then the fellows were unhooking the little trailer from the car after it was on its wheels?

A. That is right.

Q. You weren't there when the Ford and trailer and DeSoto were taken off the place where they set after the accident? A. No.

Q. Now, Mr. Page, page 60 at line 1, I ask you if you didn't testify in the former action as follows. This is cross-examination by Mr. Wright: "Mr. Page, the first thing that you had to do was to put the trailer back upon its wheels, didn't you?

A. Yes. Q. So you wouldn't be pulling the trailer until after it was on its wheels? A. That is right.

"Q. Couldn't you have taken your wrecker, placed it with the front end headed westward, run your cable back to the trailer that was tipped over on the side, hooked on to this corner and tightened the winch and tipped it over on its wheels? A. Could have, yes. It would have been possible." Now didn't you so testify?

A. I just got through testifying to the same thing.

(Testimony of H. L. Page.)

Redirect Examination

Q. (By Mr. Pike): Would that have been a safe and proper way of doing it?

A. No sir. [283]

Jury admonished and recess taken at 4:45 P.M.

Tuesday, November 15, 1955

10:00 A.M.

Presence of the jury stipulated.

The Court: At the conclusion of our afternoon hearing yesterday, the plaintiffs had rested their case, is that correct?

Mr. Wright: Yes, plaintiffs had rested.

MR. PAGE

resumed the witness stand on further

Redirect Examination

Q. (By Mr. Pike): Mr. Page, after your tow car was damaged in the accident of December 31, 1954, did one of the front doors of the cab either remain in your possession or come back into your possession following the accident?

A. Yes sir.

Q. And which door of the cab on the tow car was it? A. The left door.

Q. Where did you keep that door?

A. It was kept in the garage until the crank that wound up the glass was removed and then it was thrown out back in the junk pile.

Q. Did you advise me yesterday of the fact that you had that door? A. Yes sir.

(Testimony of H. L. Page.)

Q. And thereafter, at my request, did you ask by telephone that the door be sent down here to Reno? A. Yes sir. [284]

Q. Now have you changed the condition of that door in any way since the accident, so far as the color of the paint or anything of that nature is concerned? A. No sir.

Q. And the door is in a damaged condition. What is the reason it appears to be in a damaged condition?

A. Due to the collision with the car and the wrecker.

Q. Since arriving at the courthouse this morning, have you seen the particular door, concerning which you have just given testimony?

A. Yes sir.

Q. I will ask you whether or not that door is now in substantially the same condition that it was when it was removed from the Page tow car, following the accident referred to?

A. Yes sir, outside of being out in the weather in the scrap pile. Scratches might be on it.

Q. With that exception, though, it is substantially in the same condition as it was, so far as color is concerned, prior to the accident?

A. Yes sir.

Q. And at the time of its removal, it was damaged, is that correct? A. Yes sir.

Mr. Pike: We ask that be marked next in order.

Mr. Taber: We will stipulate that may be [285]

(Testimony of H. L. Page.)

marked and admitted in evidence as defendant's next in order.

The Court: Defendant's E.

Q. Mr. Page, is this door that is in the court room now and just been marked defendant's Exhibit E in the case, the door from the Page wrecker, concerning which you testified? A. Yes sir.

Q. How old are you, Mr. Page?

A. Fifty-six.

Mr. Pike: That's all.

Mr. Wright: We have no questions.

(Witness excused.)

The Court: Have you anything further?

Mr. Pike: Nothing further in the way of evidence to be offered on behalf of Mr. Page, your Honor, but there is a certain motion we would like to make in the absence of the jury.

The Court: You have submitted all your evidence?

Mr. Pike: That is right.

The Court: Rested your case?

Mr. Pike: Yes.

The Court: Any rebuttal?

Mr. Wright: No rebuttal.

The Court: Let the record show defendant has rested his case and there is no rebuttal on the part of plaintiffs.

Jury admonished and excused at 10.20 A.M. [286]

Motions for directed verdict on part of respective counsel argued and denied.

Motion by Mr. Taber to strike answer of defendant Page that the wrecker he was operating was an emergency vehicle argued and denied.

Recess taken at 10:30.

11:30 A.M.

In Chambers

The Court: Let the record show that the Court and counsel are meeting in chambers, for the purpose of settling, allowing and taking exceptions to instructions, under Rule 51, and it is stipulated by counsel that this matter could be disposed of in chambers, in lieu of being in open court.

The plaintiffs have presented to the Court a set of instructions, part of which the Court has approved and taken, 12 in number, some of these with modifications, and has particularly taken plaintiffs' instructions Nos. 14, 15, 16, 18, 20, 21, 27, 28, 29, 32, 34, and 34(a).

The defendant submitted to the Court certain numbered instructions, from which the Court took and approved instructions Nos. 5, 11, 17, 18 and 20.

The Court has prepared instructions additional to those which it has taken from the plaintiffs' and defendant's offered instructions, and these, incorporated with plaintiffs' and defendant's instructions, cover instructions numbered 1 to and [287] including 51, with the exception of Instruction No. 8, which was deleted, therefore the total instructions are 50. Court and counsel have gone over these instructions together and they have like numbered sets.

The plaintiffs may now call the Court's attention to any exceptions and objections they may have to the Court's instructions numbered 1 to 51.

Mr. Wright: If the Court please, the plaintiffs wish to take exception to No. 12. This instruction deals with the general subject of the duty to look, see objects clearly visible. Under the circumstances, we think it should not be given, because of the ice, passing the truck, the blending of the wrecker with the highway, and it is not applicable. In this connection, if this instruction is given, we believe we have an instruction prepared to define what is clearly visible, that whether an object is clearly visible depends on all of the surrounding circumstances. There isn't anything to show what is defined as clearly visible. Some people might think standing on the highway means clearly visible and looking up when that person is driving down the road. Under those same circumstances, the test is whether or not the object is clearly visible. We would ask at least that modification.

The Court: The exceptions will be noted.

Mr. Wright: If the Court please, with reference to Instruction No. 32, we wish to have the plaintiffs except to the [288] instruction, by Jennie Duff, the plaintiff, and Elizabeth Bronson, the plaintiff and we wish to severally, and not jointly, on their behalf, and the elements that are missing are these: At the end of the sentence it says: " * * * they were also under a duty to warn or notify the said John Duff of the presence of said tow truck upon the

highway, if the danger of the collision was or should have been apparent." We object to that specifically on this ground, that a duty of a passenger is not to warn when they see an object on the road, because Duff may have seen it, and it is only where the passenger realizes, or should realize, that John Duff was not seeing it, and does not cover that element. The same instruction: "Failure to perform the foregoing duty, if any, by either of the plaintiffs, Jennie Duff or Elizabeth Bronson, would constitute negligence on the part of these plaintiffs or either of them." Under that instruction, suppose Elizabeth Bronson was not negligent in warning, the other person was asleep, or seemed asleep in the back seat, under this instruction the failure to perform the duty, if any, by either of the plaintiffs would constitute negligence on part of the plaintiffs. You are to impute negligence of Elizabeth Bronson to Jennie Duff, and you cannot do it.

The Court: Following exceptions taken by counsel for the plaintiffs to Instruction 32, the last sentence of that instruction, has been amended to conform with the exceptions and will be so given. [289]

Mr. Wright: May I also call attention of the Court that we claim the error of the preceding sentence has not been cured; in other words, it is defective, that not only must the passenger see, or should have seen, but they must realize, or should have realized, that John Duff was not aware of the apparent danger, and fails to cover that feature.

Now I think with the rest of the instructions we

have no objections. We have some to offer in our behalf.

The Court: Plaintiffs have no further exceptions or objections to the remainder of the instructions allowed by the Court, but does have certain instructions which they desire to offer, in addition to those allowed.

Mr. Wright: Yes, if the Court please. That is all the exceptions.

The Court: For the purpose of identifying the plaintiffs' instructions now being offered, they are numbered in the following manner: A, B, C, etc. Let the record show that plaintiffs have offered certain instructions, with request that they be given, these instructions being lettered A to M, for the purpose of the offer. The Court is of the opinion that these offered instructions are included in those approved by the Court and are covered, or that they do not constitute the law applicable to this case and the evidence. [290]

Mr. Hanson: Comes now the defendant and takes exception to the Court's Instruction No. 23, the whole and each part thereof, on the ground and for the reason that the evidence conclusively shows, as a matter of law, that if the plaintiff, John Duff, was placed in emergency created by sudden peril, such emergency resulted from his own negligence, and under the undisputed evidence in this case as to the distance the collision was from the crest of the hill immediately to the east, the undisputed evidence on visibility, this instruction should not be

given, because it will tend to mislead and confuse the jury.

Defendant excepts to the second paragraph of the Court's Instruction No. 25, upon the ground and for the reason that the evidence shows conclusively, as a matter of law, that the circumstances existing at the time of said accident, it was not necessary for the defendant Page, in the exercise of ordinary care, to put out flares, station a flagman, or to have any other warning, other than what the evidence showed existed at the time of said accident.

Also that the defendant takes exception specifically to the words "other warnings", on the ground that they are too general and leading the jury to speculate as to warning there might be required to give under the circumstances. The defendant contends that, as a matter of law, the defendant was not negligent in not taking any of the steps mentioned in the second part of this instruction, that his failure to do so, as a matter [291] of law, was not a proximate cause of this collision, and the giving of said instruction, second paragraph, would tend to mislead and confuse the jury, and the law as stated there is not applicable to the facts as adduced by the evidence in this case.

Defendant excepts to the Court's Instruction No. 26, on the grounds and for the reason defendant's evidence is undisputed that defendant Page not only had a right to park his wrecker in the place it was parked, where the accident occurred, but that such procedure was necessary for efficient, quick operation involved in getting the Shaw car clear

back on the highway; that there is no issue and no evidence adduced in the case that Page parked his wrecker truck on the highway in such a manner as to occupy more than would reasonably be necessary under the circumstances and also under the evidence and as a matter of law, it was conclusive that the visibility was unlimited and that it was unnecessary for the defendant, Page, to have had flags or guards or other practical means. Defendants except to the words "other practical means" because they are too general and permit the jury to stipulate as to anything the defendant might have done under the circumstances. Defendant contends again that, as a matter of law, the failure to have flags or cards or other practical warnings could not have been the proximate cause of this accident, under all the evidence.

Defendant excepts to the second paragraph of Court's Instruction No. 28, wherein the jury are told that the speed [292] at which a vehicle travels upon the highway, considered as an isolated fact at so many miles an hour, is not proof either of negligence or of the exercise of ordinary care, upon the grounds that said part of the instruction is not a correct statement of law, and as to said part of said instruction, would tend to mislead and confuse the jury, and does not correctly state the law.

Defendant excepts to the Court's Instruction No. 29, upon the ground it is not a correct statement of the law, inasmuch as the evidence is undisputed that John A. Duff and Jennie R. Duff are residents of the State of Idaho and that the automobile which

they were driving was community property, that the negligence of the plaintiff, John A. Duff, is imputed to the plaintiff Jennie R. Duff. Defendant does not except to the last part of the instruction: "or to the plaintiff, Elizabeth Bronson."

Comes now the defendant and also excepts to the Court's failure to give their requested Instructions Nos. 1, 2, 3, and 4, separately as well as jointly, upon the grounds and for the reasons mentioned in the motion for a directed verdict made at the close of the evidence.

Defendant excepts to the Court's refusal to give defendant's requested Instruction No. 8(b), which stated in fact that inasmuch as two of the plaintiffs in the action, John A. Duff and Jennie R. Duff, are husband and wife, if the jury should find that Mr. Duff was negligent and such negligence [293] was the proximate cause of the accident, then Mrs. Duff can not recover. Such statement is merely a quote in the substance of the request.

Defendant excepts to the Court's refusal to give defendant's requested Instruction No. 11, that it was the duty of the plaintiff, John A. Duff, to keep a reasonable lookout for vehicles on the highway, that he was required, as a matter of law, to see what could have been seen, and if he did not see the defendant's wrecker at a time when he should have seen it, in the exercise of reasonable care, then he was negligent and such negligence was the sole and proximate cause of the accident and plaintiffs can not recover, upon the grounds and for the reason that said instruction contained a correct statement

of the law as applicable to the evidence adduced in this case.

Defendant excepts to the refusal of the Court to give defendant's Instruction 12 as requested, for the same reason, that said instruction contains a correct statement of law applicable to the case.

Defendant excepts to the Court's refusal to give defendant's Instruction No. 13, on the grounds and for the reason it is a correct statement of law.

The Court: In connection with the objections on the part of the defendant to the failure of the Court to give certain numbered instructions, the Court has refused these instructions for the reason [294] that it is of the opinion that, without going into detail as to each separate instruction, that they are not applicable to the facts of this case, as adduced by the evidence, that they do not state the law of the case as shown to be applicable by the evidence, and finally that the instructions have been covered in other instructions by the Court.

Mr. Wright: If the Court please, may I have the record show that in the offer of the instructions of A to M inclusive that each of the plaintiffs severally request each and every one of the instructions from A to M inclusive.

The Court: The record will so show. Gentlemen, the Court has prepared suggested forms of verdict. There are three plaintiffs and a counterclaimant, which permits four affirmative or four negative verdicts to be returned. I present these forms of verdict to you, eight in number, and it is my under-

standing that counsel stipulate that these are proper forms.

Mr. Wright: So stipulated.

Mr. Pike: So stipulated.

The Court: It is stipulated at this time that Exhibit 20 on the part of the plaintiffs, consisting of the blackboard and the drawings thereon, will be [295] photographed and the photograph will be considered as plaintiffs' Exhibit 20 in the case.

Mr. Wright: So stipulated.

Mr. Hanson: So stipulated.

3:55 p.m.

Presence of the jury stipulated.

INSTRUCTIONS OF THE COURT

Instruction No. 1

Ladies and Gentlemen of the Jury:

It now becomes the duty of the Court to instruct you as to the law covering your deliberations in this trial.

Upon all questions of law, it is your duty to be guided by the instructions of the Court and to accept the law as given to you by the Court. You are, however, the sole and exclusive judges of all questions of fact and of the weight and effect of the evidence and of the credibility of the witnesses.

Your power of judging the effect of evidence is not arbitrary, but is to be exercised with legal discretion and in accordance with the rules of evidence.

You must not consider for any purpose any testi-

mony which has, by the order of the Court, been stricken out. Such testimony is to be treated as though you had never heard it.

You should disregard statements, if any, made by the attorneys not supported by the evidence. However, any facts [296] stipulated to by counsel may be treated by you as facts proven in the trial.

You must weigh and consider the case now being tried by you without regard to sympathy, prejudice or passion for or against any party in this case.

Instruction No. 2

There are certain general principles of law to which the Court desires to call your attention.

You will understand that under our system the Court and the jury have a divided responsibility. It is the duty of the Court to decide all questions of law which may arise during the progress of the trial, and the duty of the jury to pass upon the facts. If the Court is unfortunate enough to make a mistake in deciding those questions of law, there is another court which may be appealed to, to correct these mistakes. It is, therefore, the duty of the jury to take the law as laid down by the Court, because if the jury should undertake to determine what the law is, and should make a mistake, there is no way of remedying it. It is the province of the jury to pass upon the facts of the case, upon the credibility of the witnesses, and to apply the law to the facts of the case as they find the facts to be. The Court is just as little inclined to interfere with the province of the jury passing upon the facts of the case,

as it is sensitive about having the jury undertake to determine what is the law of the case. With this understanding of our [297] respective duties, the Court states to you the following general principles.

Instruction No. 3

In civil cases, and this case is a civil case, the affirmative of issues must be proved by a preponderance of the evidence. The affirmative here is upon the plaintiffs as to all of the affirmative allegations of their complaint, which have not been admitted by the defendant, and upon the defendant as to any of the affirmative allegations of his answer or of his counterclaim. The burden of proof, therefore, rests upon the parties making such affirmative allegations which are not admitted by the opposing parties.

If the evidence is contradictory, your decision must be in accordance with the preponderance of the evidence. It is your duty, if possible, to reconcile such contradictions so as to make the evidence unveil the truth. When the evidence, in your judgment, is so equally balanced in weight and quality, effect and value, that the scales of proof hang even, your verdict should be against the parties upon which rest the burden of proof.

Instruction No. 4

The jury is the sole and exclusive judges of the effect and value of evidence addressed to them and of the credibility of the witnesses who have testified at this trial. There are some standards or rules by

which you can measure the testimony [298] of a witness and evaluate it and determine whether or not you want to believe it or how much of it you want to believe.

The character of the witnesses, as shown by the evidence, should be taken into consideration for the purpose of determining their credibility and determining whether or not they have spoken the truth. The jury may scrutinize the manner of witnesses while on the stand and may consider their relation to the case, if any, and also their degree of intelligence.

A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testified, his interest in the case, if any, his bias or prejudice, if any, by the character of his testimony, or by contradictory evidence.

A witness may be impeached by contradictory evidence or by evidence that on some former occasion he made statements or conducted himself in a manner inconsistent with his present testimony as to any material matters to the cause on trial.

The impeachment of a witness in any of the ways I have mentioned does not necessarily mean that his testimony is completely deprived of value, or that its value is destroyed in any degree. The effect, if any, of the impeachment upon the credibility of the witness is for you to determine.

A witness wilfully false in one material part of his testimony is to be distrusted in others. The jury may reject [299] the whole of the testimony of a witness who has wilfully sworn falsely as to a mate-

rial point. If you are convinced that a witness has stated what was untrue as to a material point, not as a result of mistake or inadvertence, but wilfully with the design to deceive, then you may treat all of his testimony with distrust and suspicion, and reject all, unless you shall be convinced that he has in other parts sworn to the truth. You may also consider the manner in which a witness may be affected by the results of your verdict. You may also consider the extent to which he has been corroborated or contradicted by other evidence. Of course, any matter in general which you contend reasonably sheds light upon the credibility of the witness may be considered by you.

Instruction No. 5

The rules of evidence ordinarily do not permit the opinion of a witness to be received in evidence. An exception to this rule exists in the case of expert witnesses. A person who, by education, study and experience, has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matters in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it.

You are not bound by such an opinion. Give it the weight to which you deem it entitled whether that be great or [300] slight, and you may reject it if, in your judgment, the reasons given for it are unsound.

Instructions No. 5(a)

A doctor is permitted to testify concerning statements made to him by a patient in connection with his efforts to learn the patient's history and condition for purposes of diagnosis and treatment. Such evidence is received and may be considered for only the limited purpose of showing the information upon which the doctor based his opinions. The statements so repeated by the doctor may not be regarded as evidence of their own truth. However, if it appears that a person made a statement to a doctor which was in conflict with that person's testimony in court, that inconsistency may be considered in determining the credibility of the witness.

Instruction No. 6

By a preponderance of evidence is meant such evidence as when weighed with that opposed to it has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests.

"Preponderance of evidence" does not mean the greater number of witnesses, but the greater weight, probability, quality and convincing effect of the evidence and proof offered by the party holding the affirmative as compared with the opposing evidence. [301]

Instruction No. 7

While it is incumbent upon one who asserts the affirmative of an issue, thus having the burden of proof, to prove his allegation by a preponderance of the evidence, this rule does not require demon-

stration, that is, such degree of proof as, excluding possibility of error, produces absolute certainty; because such proof is rarely possible.

In a civil action such as the one we are now trying, it is proper to find that a party has succeeded in carrying his burden of proof on an issue of fact, if the evidence favoring his side of the question is more convincing than that tending to support the contrary side, and if it causes the jurors to believe that on that issue, the probability of truth favors that party.

Instruction No. 8

The burden rests upon each party to prove by a preponderance of the evidence the elements of his or her damage, if any. The mere fact that an accident happened, considered alone, would not support a verdict for any particular sum.

Instruction No. 10

Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human [302] affairs. It is the failure to use ordinary care in the management of one's property or person.

Negligence is not an absolute term, but a relative one. By this we mean that in deciding whether there was negligence in the given case, the conduct in question must be considered in the light of all the surrounding circumstances, as shown by the evidence.

Instruction No. 11

Ordinary care as used in these instructions is the care that ordinary prudent persons exercise under the same or similar circumstances, in a matter concerning their own business, and the failure upon the part of a person to exercise such care is negligence.

Instruction No. 12

General human experience justifies the inference that when one looks in the direction of an object clearly visible, he sees it, and that when he listens, he hears that which is clearly audible. When there is evidence to the effect that one did look, but did not see that which was in plain sight, or that he listened, but did not hear that which he could have heard in the exercise of ordinary care, it follows that either there is an irreconcilable conflict in such evidence or the person was negligently inattentive.

Instruction No. 13

You will note that the person whose conduct we set up as a standard is not the extraordinarily cautious individual, nor the exceptionally skillful one, but a person of reasonable and ordinary prudence. While exceptional skill is to be admired and encouraged, the law does not demand it as a general standard of conduct.

Instruction No. 14

The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party, to this action was negligent.

Instruction No. 15

The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury.

Instruction No. 16

This does not mean that the law seeks and recognizes only one proximate cause of an injury, consisting of only one factor, one act, one element of circumstances, of the conduct of only one person. To the contrary, the acts and omissions of two or more persons may work concurrently as the efficient cause [304] of an injury, and in such a case, each of the participating acts or omissions is regarded in law as a proximate cause.

Instruction No. 17

Negligence is not an absolute term, but a relative one. By this we mean that in deciding whether there was negligence in a given case, the conduct in question must be considered in the light of all the surrounding circumstances, as shown by the evidence.

This rule rests on the self-evident fact that a reasonably prudent person will react differently to different circumstances. Those circumstances enter into, and in a sense are part of, the conduct in question. An act negligent under one set of conditions might not be so under another. Therefore, we ask: "What conduct might reasonably have been

expected of a person of ordinary prudence under the same circumstances?" Our answer to that question gives us a criterion by which to determine whether or not the evidence before us proves negligence.

Instruction No. 18

The law forbids you to attempt to classify negligence into degrees or grades or kinds, or to compare one instance of negligence with another and judge which is more deserving of reproof or excuse. If you should find that there was negligent conduct on the part of more than one person, you are not to attempt to determine which was guilty of the greater negligence, [305] with a view to delivering a verdict in favor of, or to favor in any way, the one whose conduct was the less reprehensible.

Instruction No. 19

When it appears that the conduct of two or more persons, acting independently and at different times, created or contributed to the circumstances out of which injury resulted, the question of proximate or remote cause requires the jury to consider thoughtfully the relationship between the conduct of one person, whom, for convenience, I shall call the original actor; the conduct of another, whom I shall call the secondary actor; and the sequence of events leading to the injury.

Of course, the first question to be answered is whether or not the defendant was negligent. If he was not, then he may not be held liable even if his conduct was a proximate cause of the accident. If

the defendant was negligent, then you must determine what the effect of that negligence was and whether or not that effect was extended, enhanced, broken or changed by an efficient intervening cause. Was the conduct of a secondary actor, who is not a defendant in this case, an intervening agency, which brought defendant's conduct into proximate causal relationship to the injury? Or was that later conduct the sole proximate cause? The test is this: If the defendant foresaw, or by exercising ordinary care would have foreseen, the probability of the conduct of the secondary actor and [306] the probability that defendant's conduct plus the secondary conduct would result in injury to a third person, then the conduct of the defendant was a proximate cause of the injury. But if the probable result was not thus foreseen or foreseeable by the defendant, then he may not be held liable.

Instruction No. 20

Contributory negligence is negligence on the part of a person injured which, cooperating in some degree with the negligence of another, helps in proximately causing the injury of which the former thereafter complains.

One who is guilty of contributory negligence may not recover from another for the injury suffered.

Instruction No. 21

In order that any of the parties recover, it is not necessary that he or she prove all of the grounds of negligence alleged in the complaint or counterclaim; any party may recover if you find that the

other was negligent and that said negligence contributed in some degree, as a proximate cause, to the injuries of such party and the party was not guilty of contributory negligence.

Instruction No. 22

In the action of Duff vs. Page, Mr. Page claims that Mr. Duff was guilty of contributory negligence. Likewise, in the counterclaim of Page vs. Duff, Mr. Duff claims that Mr. Page [307] was guilty of contributory negligence. In order to prove the defense of contributory negligence, the burden is on the one who asserts it to prove two things, (1) negligence, and (2) that such negligence was a proximate cause of the injuries suffered. If the defendant Page fails to prove either of these things, then the defense of contributory negligence falls. Likewise, if the counter defendant Duff fails to prove either of these things, his defense of contributory negligence fails.

Instruction No. 23

A person who, without negligence on his part, is suddenly and unexpectedly confronted with peril, arising from either the actual presence, or the appearance, of imminent danger to himself or to others, is not expected, nor required, to use the same judgment and prudence that is required of him, in the exercise of ordinary care, in calmer and more deliberate moments. His duty is to exercise only the care that an ordinary prudent person would exercise in the same situation. If at that moment he does what appears to him to be the

best thing to do, and if his choice and manner of action are the same as might have been followed by any ordinarily prudent person under the same conditions, he does all the law requires of him, although, in the light of after-events, it should appear that a different course would have been better and safer.

Instruction No. 24

It is the duty of every person using a public highway, whether a pedestrian or the driver of any kind of vehicle, to exercise ordinary care at all times to avoid placing himself or others in danger and to avoid a collision.

Instruction No. 25

You are instructed that even though the defendant, H. L. Page, had a right to park his truck on the main traveled portion of the highway, yet he was required to use ordinary care in warning others that might be reasonably expected to use the highway of the presence of such truck.

If you find that at the time and place of the accident a person of ordinary prudence would have put out flares, a flagman or other warning to warn of the presence of the defendant's truck on the main traveled portion of the highway, then you are instructed that the failure to put out flares, flagman or other warning was negligence.

Instruction No. 26

You are instructed that the operator of a wrecker truck being used to restore a wrecked vehicle to the highway, may park the wrecker on the main trav-

eled portion of a public highway for a reasonable length of time, under the following conditions:

1. That it is necessary to park the wrecker truck on [309] the main traveled portion of the highway.

2. That the wrecker truck must not occupy more of the highway than is reasonably necessary under the circumstances.

3. And that approaching traffic must be fully warned of the obstruction by lights, flags, guards or other practical means in the event the circumstances are such that an ordinarily prudent person would give such warning by any of the means suggested.

Instruction No. 27

A person who, himself, is exercising ordinary care has a right to assume that others, too, will perform their duty under the law, and he has a further right to rely and act on that assumption. Thus it is not negligence for such a person to fail to anticipate injury which can come to him only from a violation of law or duty by another.

Instruction No. 28

You are instructed that Section 4350 of the Nevada Compiled Laws, provides as follows:

“It shall be unlawful for any person or persons to drive or operate a vehicle of any kind or character in a reckless manner on any street or highway in this state; or in any other than a careful or prudent manner; or at a rate of speed greater than is reasonable and proper, having due regard for the traffic, surface and width of the highway; or at such

a rate of speed as to endanger the life, limb or property of any [310] person.”

The speed at which a vehicle travels upon a highway, considered as an isolated fact and simply in terms of so many miles an hour, is not proof either of negligence or of the exercise of ordinary care.

Whether that rate of speed is a negligent one is a question of fact, the answer to which depends on all of the surrounding circumstances.

Instruction No. 29

You are instructed that the negligence, if any, of John A. Duff cannot be imputed to the plaintiff, Jennie R. Duff, or to the plaintiff, Elizabeth Bronson.

Instruction No. 30

While the amount of any verdict you may decide to return in favor of any party in this case is left to your sound discretion, your award in each instance must be just and reasonable and must be based exclusively upon the evidence introduced and these instructions. The law does not prescribe any definite standard by which to compensate an injured person for any pain, discomfort and anxiety suffered by him or her, nor does it require that any witness should have expressed an opinion as to the amount of damages that would compensate for such injury. The law does require, however, that when making an award for pain, discomfort and anxiety, the jury must exercise its authority with calm and reasonable judgment, and that the damages [311] awarded shall be just and reasonable and shall not exceed the amount prayed for in the complaint.

Instruction No. 31

In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it.

Instruction No. 32

You are instructed that the plaintiffs, Jennie Duff and Elizabeth Bronson, were passengers in the automobile driven by the plaintiff, John Duff, when said accident occurred; that as passengers, they had no right to control the manner in which the plaintiff, John Duff, was operating the vehicle at said time and place, and if you find that he was negligent as defined in these instructions, such negligence, if any, is not imputable to the plaintiffs, Jennie Duff and Elizabeth Bronson. However, you are further instructed that the plaintiffs, Jennie Duff and Elizabeth Bronson, as passengers in said automobile, were under a duty to exercise reasonable care for their own safety, and if you find from the evidence that they knew, or [312] under the circumstances should have known, that the plaintiff, John Duff, was driving said vehicle in a negligent or careless manner, then it became the duty of said plaintiffs to protest the manner in which he was operating said vehicle, and if they saw or under the circum-

stances should have seen the defendant's tow truck, they were also under a duty to warn or notify the said John Duff of the presence of said tow truck upon the highway, if the danger of the collision was or should have been apparent. Failure to perform the foregoing duty, if any, by either of the plaintiffs, Jennie Duff or Elizabeth Bronson, would constitute negligence on the part of the plaintiff failing in said duty, and if you find that such negligence, if any, was a proximate contributing cause of said accident or injuries sustained by these plaintiffs, then they cannot recover damages against the defendant, Page.

Instruction No. 33

The plaintiff, John A. Duff, seeks recovery for the following items of damages:

1. General damages for injuries received by John A. Duff in the sum of \$10,000.00.
 2. Elko Clinic, medical treatment \$80.00.
 3. Elko County General Hospital, hospital treatment \$215.60.
 4. One pair of glasses \$46.00.
 5. Dr. Charles A. Terhune, medical treatment \$10.00. [313]
 6. One-third ($\frac{1}{3}$) ambulance charge to Elko, Nevada \$11.66.
 7. Loss of services of Mrs. Jennie R. Duff \$2,000.00.
 8. Damages to 1955 DeSoto Sedan \$2,059.57.
 9. Towing automobile, scene of accident to Burley, Idaho \$85.07.
- Total \$14,507.90.

Instruction No. 34

The plaintiff, Jennie R. Duff, seeks recovery for the following items of damages:

- (1) Elko Clinic, medical treatment \$334.50.
 - (2) Elko County General Hospital, hospital treatment \$431.05.
 - (3) One-third ($\frac{1}{3}$) of ambulance—scene of accident to Elko \$11.67.
 - (4) Air Ambulance, Elko to Burley \$70.00.
 - (5) Dr. C. R. Kern, Jr., Anesthetist, Elko \$15.00.
 - (6) Dr. C. M. & E. H. Elmore, eye treatment \$12.00.
 - (7) Dr. C. W. Keen, optometrist \$9.00.
 - (8) Back brace \$90.00.
 - (9) Trip—Burley to Boise for back brace—350 miles at 9c per mile \$26.00.
 - (10) Drugs and medicines \$56.50.
 - (11) Nursing and housekeeper \$205.50.
 - (12) Cottage Hospital, Burley, Idaho, for X-rays \$77.50.
 - (13) Dr. Chas. A. Terhune, Burley, Idaho \$250.00. [314]
 - (14) General Damages \$50,000.00.
- Total \$51,588.72.

Instruction No. 35

The plaintiff, Elizabeth Bronson, seeks recovery for the following damages:

1. Elko Clinic, medical treatment \$217.00.
2. Elko County General Hospital, hospital treatment \$393.95.
3. H. B. Grover, M.D., Vallejo, Calif. \$10.00.

4. Dr. Lee, Vallejo, California \$3.00.
5. Drs. Butler & Ritter \$25.00.
6. One-third ($\frac{1}{3}$) ambulance—scene of accident to Elko \$11.67.
7. Travel expenses—Elko to Berkeley, train fare and Pullman \$22.04.
8. Automobile, Berkeley to Menitia \$5.00.
9. Meals on train \$1.50.
10. Mrs. Alameda Nielsen, nurse attendance on trip—Elko to Berkeley—Railroad fare \$52.05.
11. Betty Joe Bronson—2 days nursing \$20.00.
13. Loss of earnings—January 13, 1955 to date of trial—42 weeks @ \$15.00 per week \$630.00.
14. Dr. Brockbank \$342.50.
15. General damages \$25,000.00.
- Total \$26,793.71. [315]

Instruction No. 36

If you find that the plaintiff, John A. Duff, is entitled to recover damages by this action, you shall award him a sum that will compensate him reasonably for any loss of his wife's services that he has suffered, or is reasonably certain to suffer in the future, as a proximate result of the accident in question, but not to exceed \$2,000.00.

In determining that amount, should you decide so to do, your object shall be to fix the pecuniary value of the services thus lost. To that end, you should consider, as shown by the evidence, the character and conditions of the home wherein plaintiffs, John A. Duff and Jennie R. Duff, his wife, have dwelled; the services, if any, that have been performed by

the wife in the management of the household and the performance of household duties.

The plaintiff, John A. Duff, also seeks to recover damages to his 1955 DeSoto Sedan automobile.

In fixing the damages to a vehicle, you shall allow said plaintiff such sum as well reasonably compensate said plaintiff for damage to said property. The sum is equal to the difference in the fair market value of the property immediately before and after the injury; provided, however, that if the vehicle has been repaired, so as to restore the fair market value as it existed immediately before the injury, at an expense less than such difference in value, then the measure of damage is the expense of such repair, rather than such [316] difference in value.

The plaintiff, John A. Duff, also seeks recovery of damages for his own personal injuries, which items of damage are outlined in other instructions.

Instruction No. 37

You are instructed that in the event you find in favor of the defendant and counterclaim, H. L. Page, and against the plaintiff, John Duff, on the defendant Page's counterclaim, you shall award to the defendant and counterclaimant Page such amount as you find from a preponderance of the evidence he is entitled to receive in connection with the following items:

First: The reasonable value of the medical and doctor expenses, not exceeding the sum of \$62.00.

Second: The reasonable value of the cost of re-

pairing said tow truck, not to exceed the sum of \$1,040.97, and the reasonable value of the loss of use of said vehicle while the same was being repaired, not to exceed the sum of \$622.00, and miscellaneous expense in the sum of \$91.61.

Third: Such sum as general damages, not exceeding the amount of \$20,000.00, as will reasonably compensate the defendant, Page, for the pain, discomfort, distress and disability suffered by him proximately resulting from the injuries complained of, and such discomfort, distress and disability which he will continue to suffer in the future, if any. In determining this amount, you should take into consideration the nature [317] and extent of defendant's injuries, whether the same are temporary or permanent in nature, the extent of disability, both mental and physical, if any, which the defendant will continue to suffer, his loss of earning power, if any, and such loss of bodily function, if any, that defendant, Page has sustained.

Instruction No. 38

Neither the allegations of the complaint or the counterclaim as to the amount of damage any party claims to have suffered, nor the prayer asking for certain compensation, is to be considered by you in arriving at your verdict, except in this one respect, that the amount of damage alleged in a party's pleading does fix a maximum limit, and you are not permitted to award such party more than that amount.

Instruction No. 39

You are not, in ascertaining the amount of damages, if any, to resort to the pooling plan or scheme, which has sometimes been adopted by juries for such purpose. That plan or scheme is where each juror writes the amount to which he considers a party is entitled, and the amounts so written are added together, and the total divided by twelve. This is a scheme of chance, and no element of chance may enter into your verdict or into the determination of any question necessary thereto. [318]

Instruction No. 40

You are not permitted to award a party speculative damages, by which term is meant compensation for prospective detriment which, although possible, is remote, conjectural or speculative.

However, should you determine that a party is entitled to recover, you should compensate him for prospective detriment if it has been shown by a preponderance of the evidence that there is such a degree of probability of that detriment occurring as amounts to a reasonable certainty that it will result from the original injury.

Instruction No. 41

There is a restricted significance of evidence as to life expectancy. Life expectancy shown by the mortality tables is merely an estimate of the probable average remaining length of life of all persons in our country of a given age, and that estimate is based on not a complete, but only a limited, record

of experience. Therefore, the inference that may be drawn from life expectancy tables applies only to one who has the average health and exposure to danger of people of that age. Thus, in connection with this evidence you should consider all other evidence bearing on the same issue, such as that pertaining to the occupation, health, habits and activities of the person whose life expectancy is in question. [319]

Instruction No. 42

According to the American Table of Mortality, the expectancy of life for persons of the ages indicated below are as follows:

Age of Person	Expectancy of Life
66 John A. Duff	10.54
61 Jennie R. Duff	13.47
58 Elizabeth Bronson	15.39
56 H. L. Page	16.72

The above facts, of which the Court takes judicial notice, is now in evidence to be considered by you in arriving at the amount of damages, if you find any of the above persons are entitled to a verdict.

Instruction No. 43

You have been instructed on the subject of the measure of damages in this action because it is my duty to instruct you as to all the law that may become pertinent in your deliberations. I, of course, do not know whether you will need the instructions on damages and the fact that they have been given to you must not be considered as intimating any view

of my own on the issue of liability or as to which party is entitled to your verdict.

Instruction No. 44

You are instructed that the parties have stipulated that the items of expense such as hospital, doctor, repair, and [320] traveling expenses were necessarily incurred, and that such items are reasonable, however, no party stipulates as to general damages such as pain and suffering, physical disability or loss of a wife's services by her husband, which amounts, if any, are left solely for your discretion under the instructions given.

These stipulations were made by counsel to conserve time and by entering into the same, no party admits liability for any item of damage.

Instruction No. 45

You are instructed that your verdict must be based solely and exclusively upon the evidence in the case. You should not be governed by passion, prejudice, sympathy or any motive whatever, except fair and impartial consideration of the evidence, and you must not under any circumstances allow any sympathy which you may have or entertain for the plaintiffs or defendant to influence you in any degree whatsoever in arriving at your verdict. The Court does not charge you not to sympathize with the plaintiffs, or with defendant, because it is only natural and human to sympathize with persons who have sustained loss, affliction or misfortune, but the Court does charge you not to

allow that sympathy to enter into your consideration of the case or to influence your verdict.

Instruction No. 46

If in these instructions, any rule, direction or idea [321] is stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions as a whole, and to regard each in the light of all the others.

Instruction No. 47

The attorneys have discussed the law during the course of their respective arguments. They had a perfect right to do this. I would caution you, however, that you must look to these instructions and nowhere else for the law that will guide you in your deliberations in this trial. If the attorneys, or any one else, have suggested, or if any of you believe that the law is other than it is given to you in these instructions, I charge you that you must be guided by the rules of law given to you in these instructions to the complete exclusion of any other suggested, or otherwise apparent rules of law.

Instruction No. 48

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to your individual judgment. To each of you I say that you must decide the case for yourself, but you should do

so only after a consideration of the case with your fellow jurors, and you should not hesitate to change [322] an opinion when convinced that it is erroneous. However, none of you should vote in any manner nor be influenced in so voting for the single reason that a majority of the jurors are in favor of a particular verdict. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict, or solely because of the opinion of the other jurors.

Instruction No. 49

If during this trial I have said or done anything which has suggested to you that I am inclined to favor the claim or position of either party, you will not suffer yourselves to be influenced by any such suggestion.

I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are, or are not, worthy of belief; or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

Instruction No. 50

At times throughout the trial the Court has been called upon to pass on the question whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered evidence is

admissible is [323] purely a question of law. In admitting evidence to which an objection is made, the Court does not determine what weight should be given such evidence; nor does it pass on the credibility of the witness. As to any offer of evidence that has been rejected by the Court, you, of course, must not consider the same; as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

Instruction No. 51

Upon retiring to the jury room you will select one of your number to act as your foreman or forelady who will preside over your deliberations and who will sign any verdict to which all of you agree. It will be the duty of the one so selected to serve as your spokesman in any further proceedings in this court.

The person selected to act as foreman or forelady of the jury should permit a full and free discussion of the case by the jurors in the jury room. The other jurors should assist the foreman or forelady so selected in keeping the proceedings orderly and expediting the proceedings of the jury in the jury room.

If you desire to see any of the exhibits that have been introduced in evidence, you may advise the marshal of that fact and the exhibits that you wish to see will be delivered to you in the jury room.

If it should become necessary for you to communicate with the Court on any matter connected

with the case while you are deliberating, I admonish you that you must not disclose to the Court how you stand numerically, or otherwise, and this admonition you should adhere to until the jury has reached a verdict.

It will take all twelve of you to reach a verdict. When all twelve of you have agreed upon a verdict, that is the verdict of the jury.

There has been prepared for your convenience forms of verdict. These forms of verdict have no significance in and of themselves and are not to be considered by you for any purpose other than as a convenience for your use. When you have reached your verdict, which must, as I have already told you, be unanimous, your foreman or forelady should complete the appropriate verdict form and sign it. You should then return the same to the Court. [325]

DEFENDANT'S REQUESTED INSTRUCTIONS REFUSED BY THE COURT

Instruction No. 1

You are instructed to return a verdict for the defendant, H. L. Page, and against the plaintiffs, John A. Duff, Jennie R. Duff and Elizabeth Bronson, No Cause of Action.

Instruction No. 2

You are instructed to return a verdict for the defendant, H. L. Page, and against the plaintiff, John A. Duff, No Cause of Action.

Instruction No. 3

You are instructed to return a verdict for the defendant, H. L. Page, and against the plaintiff, Jennie R. Duff, No Cause of Action.

Instruction No. 4

You are instructed to return a verdict for the defendant, H. L. Page, and against the plaintiff, Elizabeth Bronson, No Cause of Action.

Instruction No. 8(b)

Inasmuch as two of the plaintiffs in this action, namely, John Duff and Jennie R. Duff, are husband and wife, if you should find that Mr. Duff was negligent and that such negligence contributed as a proximate cause of the accident, then Mrs. Duff [326] can not recover, although she may have been wholly innocent of any negligent conduct.

Instruction No. 11

You are instructed that it was the duty of the plaintiff, John A. Duff, to keep a reasonable and adequate lookout for vehicles upon the highway in front of him, it was no legal excuse for the plaintiff, John A. Duff, to say that he did not see, if by reasonable care he could have seen. In other words, the plaintiff, John A. Duff, was required as a matter of law to see what could have been seen, and if he did not see the defendant's wrecker at a time when he should have seen it, in the exercise of reasonable care, then he was negligent, and if you find that such negligence, if any, was the sole

proximate cause of said collision, then plaintiffs can not recover, and your verdict should be in favor of the defendant, No Cause of Action.

Instruction No. 12

You are instructed that if the plaintiff, John A. Duff, could, in the exercise of reasonable care, have avoided the collision by keeping a proper lookout, by slowing down or turning out and around defendant's wrecker, or by any other reasonable means, then it was his duty to do so, and if you find that the plaintiff, John A. Duff, was negligent in any of said particulars and that such negligence, if any, was the sole cause of said accident and resulting injuries sustained by [327] plaintiffs, then plaintiffs can not recover damages, and your verdict must be in favor of the defendant, H. L. Page, and against the plaintiffs, No Cause of Action.

Instruction No. 13

You are instructed in arriving at your verdict that you should disregard any oral testimony which is inconsistent with the undisputed physical facts in evidence. [328]

PLAINTIFFS' REQUESTED INSTRUCTIONS REFUSED BY THE COURT

Instruction No. A

The plaintiffs have the right and the law encourages them to join their actions. You are to determine the rights of each plaintiff to recover as though each case was a separate action. In this con-

nection you should apply the law and facts to each case, separately, without regard to the other cases.

Instruction No. B

The plaintiff, John A. Duff, is entitled to recover damages from the defendant, H. L. Page, if you find from a preponderance of the evidence, that the defendant, H. L. Page, was negligent and such negligence proximately caused any injuries of the plaintiff, John A. Duff; provided, however, if you further find from a preponderance of the evidence, that plaintiff, John A. Duff, was negligent and such negligence proximately caused or contributed to his injuries, then he can not recover against the defendant, H. L. Page.

Instruction No. C

The plaintiff, Elizabeth Bronson, is entitled to recover damages from the defendant, H. L. Page, if you find, from a preponderance of the evidence, that said defendant was negligent and such negligence proximately caused or contributed to any injuries of the plaintiff, Elizabeth Bronson; provided, however, if you further find from a preponderance of the [329] evidence, that plaintiff, Elizabeth Bronson, was negligent and such negligence proximately caused or contributed to her injuries, then she can not recover against the defendant, H. L. Page.

Instruction No. D

The plaintiff, Jennie R. Duff, is entitled to recover damages from the defendant, H. L. Page, if

you find, from a preponderance of the evidence, that said defendant was negligent and such negligence proximately caused or contributed to any injuries of the plaintiff, Jennie R. Duff; provided, however, if you further find from a preponderance of the evidence that plaintiff, Jennie R. Duff, was negligent and such negligence proximately caused or contributed to her injuries, then she can not recover against the defendant, H. L. Page.

Instruction No. E

If the negligence of two or more persons acting jointly or severally proximately contributes to the injuries of a person, without negligence on the part of the injured person, then either of such persons is liable to the person injured. This is true regardless of the relative degree of the contribution.

It is no defense for one of such persons that some other person, not joined as a defendant in the action, participated in causing the injury. [330]

Instruction No. F

You are instructed that the mere omission of a third person to interrupt the result of a defendant's act will not amount to an intervening efficient cause.

If you find that the defendant, H. L. Page, was negligent and that such negligence proximately caused or contributed to the injuries of the plaintiff, Jennie R. Duff, or to the injuries of the plaintiff, Elizabeth Bronson, then the omission, if any, of plaintiff, John A. Duff, to avoid the parked truck of the defendant, H. L. Page, is not an inter-

vening efficient cause, and does not break the causal connection between defendant's act and the injury to said Jennie R. Duff or Elizabeth Bronson.

Instruction No. G

You are instructed that a wrecker truck or tow truck is not an emergency vehicle.

Instruction No. H

You are instructed that the operator of a tow truck must use ordinary care in using the highway in towing a vehicle from off the road onto the highway. He must comply with Section 4365 of the Nevada Compiled Laws, and where ordinary care requires, he must put out a flagman, flares or other warning.

Instruction No. I

You are instructed that the Laws of Nevada, Section 4365 of the Nevada Compiled Laws, provide as follows: [331]

"No person shall stop an automobile, nor permit it to remain standing, on the main traveled portion of any highway for a length of time greater than is reasonably required to make adjustments or repairs; provided, that where there is room to make such adjustments or repairs the motor vehicle shall be driven entirely off the main traveled portion of the highway."

You are instructed that the above law applies to trucks or tow trucks.

In weighing the evidence in this case, you will be guided by a rule now to be stated: When it has been established by the evidence that a person did stop, or leave standing, any vehicle upon the main

traveled portion of a highway, and that at such place there was room to have parked said vehicle off of the main traveled portion of the highway, then such evidence is a *prima facie* showing of negligence on the part of the person so handling the vehicle and will support a finding that he was negligent in such conduct, unless that showing, together with any other proved facts that support it, fails to preponderate over evidence that it was impracticable to stop, park or leave the vehicle off the main traveled portion of the highway.

In other words, the law places upon a person who stops a vehicle on a main traveled portion of a highway, the risk of being found to have been negligent in so doing, unless he affirmatively shows the impracticability or the impossibility, just mentioned, of handling the vehicle otherwise. [332]

Instruction No. J

The operator of a motor vehicle is required to use ordinary care in keeping a lookout to see that which is plainly or clearly visible. When there is evidence to the effect that one did look, but did not see that which was in plain or clear sight, it follows that either there is an irreconcilable conflict in such evidence or the person was negligently inattentive.

Whether an object is clearly or plainly visible is a question of fact to be determined from all of the surrounding circumstances.

Instruction No. K

The defendant has alleged that both the plaintiff, John A. Duff, driver of the De Soto automobile

involved in the accident, and the plaintiffs, Jennie R. Duff and Elizabeth Bronson, who were riders, were guilty of contributory negligence. The evidence that has been received bearing on the conduct of the driver must, of course, be considered by you in determining whether or not he was negligent and if so, whether or not his negligence contributed in any degree as a proximate cause of any injury to himself. Evidence of the conduct of the driver must be considered also as one of the factors of all the circumstances from which you will determine what happened, how it happened, and who, if any one, is responsible in damages. But you must not permit the evidence bearing on the [333] driver's conduct, or the comment of counsel concerning it, or your consideration of it, to direct your attention away from the rule of law previously stated to you, namely, the rule that if plaintiffs, Jennie R. Duff and Elizabeth Bronson, otherwise have a cause of action against the defendant, the same shall not be barred by any negligence, if any, on the part of the driver, John A. Duff. However, you are reminded that if either plaintiff, Jennie R. Duff or Elizabeth Bronson, herself was guilty of contributory negligence, she may not recover.

Instruction No. L

A plaintiff passenger in an automobile is entitled to trust the vigilance and skill of her driver unless she knows from past experience or from the manner in which the car is being driven on the particular trip, that the driver is likely to be inat-

tentive or careless. In absence of such knowledge, the passenger may take her attention off the road to look at scenery or may turn around to speak to a fellow passenger or she may go to sleep, without being chargeable with contributory negligence.

Instruction No. M

The rider in a vehicle being driven by another has the duty to exercise ordinary care for her own safety. This duty, however, does not necessarily require the rider to interfere in any way with the handling of the vehicle by the driver or to give the driver advice, instructions, warnings or [334] protests. Indeed, it would be possible for a rider to commit negligence by interfering with or disturbing the driver.

In the absence of indications to the contrary, either apparent to the rider or that would be apparent to her in the exercise of ordinary care, the rider has a right to assume that the driver will operate the vehicle with ordinary care. However, due care generally requires of the rider that she protest against obvious negligence of the driver, if she has reasonable opportunity to do so.

But the manner in which the rider must conduct herself to comply with the duty to exercise ordinary care depends on the particular circumstances of each case; and in the light of all those circumstances, the jury must determine whether or not the rider acted as a person of ordinary prudence.

[Endorsed]: Filed July 6, 1956.

[Title of District Court and Cause.]

TESTIMONY OF WILLIAM L. BELLINGER

November 9, 1955

Direct Examination

Q. (By Mr. Wright): Your name is W. L. Bellinger? A. Yes sir.

Q. You live in Elko, Nevada? A. Yes sir.

Q. Your specific address, please.

A. My address is 649 Oak Street.

Q. How long have you lived there at that same address?

A. At that same address since 1935.

Q. Are you the owner and operator, along with your wife, of a garage in Elko, Nevada?

A. Yes sir.

Q. And the garage is known as what? [1]

A. Bellinger Motor Company.

Q. Situated where?

A. 608 Commercial Street.

Q. That is across from the Southern Pacific tracks, going south? A. Yes sir.

Q. How long have you operated the Bellinger Motor Company at that same address in Elko, Nevada? A. Since 1943.

Q. Were you in the garage mechanical business before 1943? A. Yes sir.

Q. What type of business, what kind, did you have before 1943?

A. I had a garage on 5th Street.

(Testimony of William L. Bellinger.)

Q. Well, just generally you were in the garage business? A. Yes.

Q. How long have you been operating a garage business? A. Since 1932.

Q. Are you also a mechanic? Do you do mechanical work, or just a boss and let the other fellows do it?

A. I do a lot of mechanical work.

Q. In connection with that garage, do you operate a tow car or wrecker? A. I do.

Q. How long have you operated a tow wrecker?

A. I have had a wrecker of my own since 1943.

Q. Have you operated that wrecker of your own continuously from 1943 up to and including the present time? A. Yes sir. [2]

Q. Have you ever taken the wrecker out on U. S. 40 between Elko and Wells; that is, you, yourself? A. Yes, many times.

Q. Who usually operates the wrecker truck?

A. I usually operate it.

Q. How far have you gone eastward from Elko, Nevada, on U. S. 40?

A. I have gone as far as Wendover.

Q. Then 93 out of Wells, that goes towards Contact and towards Ely, does it? A. Yes sir.

Q. Have you ever operated on that road?

A. Yes sir.

Q. How far north towards Contact and how far towards Ely?

A. Well, not too far north; possibly ten miles.

(Testimony of William L. Bellinger.)

Q. And then I take it you have gone west from Elko, Nevada? A. Yes sir.

Q. Then also around the Elko area too?

A. Yes sir.

Q. Now on December 31, 1954—just answer this question yes or no—was there a custom existing with reference to towage of vehicles on the road, back on to the road, in the vicinity of Wells, Nevada on U. S. 40 and towards Elko, Nevada, and especially in the area from Wells down say 14, 15, 20 miles?

Mr. Hanson: Just a moment. We object as being incompetent, irrelevant and immaterial; also not specific as to [3] what he means by custom. I think custom has no bearing on the issue of negligence one way or the other and custom must be widespread. We object to the question, as calling for conclusions without proper foundation.

Mr. Wright: I merely asked him if there was and I will go into the other matters.

The Court: Objection sustained.

Mr. Wright: If the Court please, I wanted to ask him some questions in connection with that matter.

The Court: Ask the other questions and counsel can make objection.

Q. Do you know of any custom existing in connection with towage that is a wrecker operating, pulling a car or a trailer on to the highway as to putting out in the daytime any flares or flags or any type of warning? Just answer that yes or no.

(Testimony of William L. Bellinger.)

Do you know of a custom existing?

A. Yes sir.

Q. Now tell us—and I have reference to the area of U. S. 40 or Wells westward, which would include at least 10 or 14 miles west of Wells, Nevada—did that custom exist as to that area of U. S. 40—

Mr. Hanson: Just a moment. We object to the question at this time on the ground that no proper foundation here there was any custom. All the witness testified to he knew one existed. There might be a serious question whether or not it was custom or individual practice. Objected to as irrelevant and [4] immaterial and no proper foundation.

The Court: I am going to save time by saying I will rule out anything about custom. If I am wrong, I will rescind that later.

Mr. Wright: I have some other questions and then I want, in the absence of the jury, to make an offer of proof.

The Court: Yes, certainly.

Q. Now, Mr. Bellinger, are you acquainted with the mechanical operation of bringing a car when it is turned on its side and off its shoulder, putting the car on its wheels, the mechanical operation of using the tow car in doing that job?

Mr. Hanson: Objected to as incompetent, irrelevant, and immaterial, unless the essential operation would be the same as the day of the accident and done under similar conditions.

Mr. Wright: This is only preliminary and then

(Testimony of William L. Bellinger.)

I will ask a hypothetical question. If he was acquainted with the mechanical features.

Mr. Hanson: Objected to as no foundation for hypothetical question and upon the further grounds, I think the question——

The Court: Objection sustained.

Q. Now, Mr. Bellinger, assume that there was a highway which was a black asphalt surface, with a white stripe in the approximate center, so that on one side there was a distance of 11 feet——

The Court: 14 on one side and hard top, 15 on the other.

Q. ——Yes, and then one shoulder there was approximately 7 feet [5] on the other shoulder there was about 4½ feet of the gravel, with oil spilled over the top, and then a further shoulder going away from the pavement of about 3½ feet. Now assume that that highway was covered with an icy condition approximately a quarter to half an inch thick and that there was also ice on the shoulder; that a vehicle, being a Ford vehicle, has gone off the road and attached to it was a U-Haul trailer and the U-Haul trailer being of the size depicted in a picture shown in plaintiffs' Exhibit No. 8 and that the Ford car is in the approximate position that I am pointing on the blackboard and it is marked the word "Ford" on the parallelogram, and then attached to it is that trailer that you see in that same picture I exhibited to you. The trailer is attached to the Ford car by means of a tongue about four feet, turned over on its right side; that

(Testimony of William L. Bellinger.)

the trailer is off the shoulder of the road and pointed at this angle that you see on the black-board, and assume that this is the center of the highway, as shown in this diagram and that the condition of the road is as I described, and that it is in the daytime, approximately ten o'clock in the morning; there is a cloudy condition, but clear atmosphere, and that the tow truck weighs approximately $7\frac{1}{2}$ tons, with the truck and plus its tow equipment, dual wheels in the back, single wheels in front, that there are two booms which swing around from the rear, so that both will swing—they make a 360 degree angle—and that tow truck is similar to the tow truck that is described in defendant's Exhibit A, which I showed you a picture of; there is a [6] power winch on the tow truck and the cable runs through the boom. Now can you tell us what position—and assume that it is determined that it is necessary to put the trailer on its wheels that it is turned over on its right side; that the highway is a straight road, as exhibited in plaintiff's Exhibit No. 12, which I now show you, can you tell us where the wrecker could be set to put the trailer on its wheels?

Mr. Hanson: Now, if your Honor please, we object to that question on the ground it does not contain all the elements of a hypothetical question. It does not show anything about the condition of the terrain, where the trailer was or the Ford car was; no information as to time or condition in the highway of the area where the Ford trailer was,

(Testimony of William L. Bellinger.)

no evidence as to the weight of the trailer; I mean that isn't included in the question and the main question calls for a subject not a proper subject for expert testimony; in fact, it invites this man to pass on the very question the jury is to pass on. One of the ultimate facts in this case is whether or not the defendant was negligent in the way he performed that operation; and we object on the further ground the evidence shows conclusively that the trailer had been righted at the time the accident had occurred, so we are not concerned with righting of the trailer, that had already been done, that operation completed before the accident happened, so any testimony as to righting the trailer, it would seem to us to be immaterial and not relevant.

The Court: Objection sustained. [7]

Mr. Wright: If the Court please, might I amend that hypothetical question to include that the grade of the road is 3.34 per cent grade from the top of the hill downward and where the vehicle had gone off the road, the trailer and the Ford, that the same grade existed there, 3.34 per cent.

Mr. Hanson: The same objection, if your Honor please.

The Court: Same ruling.

Mr. Wright: May I, out of the presence of the jury, make an offer of proof on that phase of it?

The Court: The jury will be excused while this offer is being made.

(Testimony of William L. Bellinger.)

In the Absence of the Jury

Mr. Wright: If the Court please, with reference to my first phase of the question, as to the custom and practice, we offer to show by this witness that he is acquainted with the custom of towing and that, second, there is a custom of towing that exists on U. S. 40 and in the vicinity of 14 miles west of Wells, Nevada, on U. S. 40; that the custom is general; that this witness has operated the business during that period of time; that he stated from 1943, I believe, he has operated a wrecker himself on those highways, that he has pulled wreckers out from different vicinities and also that he has pulled out wrecks in this particular area. He is acquainted with the hill, he has been over it, he has looked at it, seen that that is the [8] operating custom that is done, he has talked with many of the operators, he has seen them operate and observed the practice and custom of operation in pulling wrecks on to the highway, and also the custom with reference to the use of warnings. First, as to custom. One custom is if it is possible to do the work off the entire road, that practice and custom is that the wrecker stays off the travelled portion or shoulder of the highway. Second, if he can not do the work there, *then the* that the custom is that the wrecker stays on the shoulder and if it stays on the shoulder, that warnings are put out on each side of the wrecker, consisting of flags or flares or road signs, "Danger", that they are put on each side of the wrecker and there is a custom

(Testimony of William L. Bellinger.)

that they have to take into consideration the hilly surface of the highway, whether it is curved or hills or brow of the hill. That put the trailer up on to the road, it can work on the shoulder and get on the pavement but must keep out the different flares as warnings. That the custom is that if there is a hill within a half mile, with ice or slippery, that warnings, consisting either of flares or signs similar to the "Danger Ahead" signs, or little flags or other warnings or flagman is placed upon the top of the hill where the vehicle can see it as it comes over the crest. That is the custom and practice that is recognized in that vicinity. Also that the practice is that where there is an icy surface, then you go farther away from the vehicle and if on the crown of a hill, you go farther away with the signs. In other words, before a vehicle [9] approaching comes to that point where there is a curve within a half mile or top of the hill within a half mile that is true.

Now with reference to the other feature of the mechanical operation we offer to show, with reference to a trailer off the road, which has first to be righted——

The Court: Now, Mr. Wright——

Mr. Wright: But the wrecker was not in the process of towing the trailer on to the highway. It hadn't started yet.

Mr. Hanson: It was just getting ready to, your Honor. I think Mr. Page testified to that.

The Court: It just isn't academically correct. It

(Testimony of William L. Bellinger.)

had already hooked up when this accident happened.

Mr. Wright: Yes, but they hadn't started yet to put the trailer up on to the highway. They had just done the preliminary work. For instance, like inspection. There is the preliminary step or preliminary matter of putting the towed car on its wheels. We are prepared to show, and the offer of proof is, that the wrecker could have remained on the shoulder, off the surface, he could attach the cable to the right corner when it is on its right side, by driving forward, pull it on its wheels or put the power on the winch, pull it over on its wheels. Also we are prepared to show that the next step, assuming that you have pulled the trailer back on to the highway, that it would not be necessary, nor was it practical, to push it in the form which this wrecker was setting, which is an angle, but it could have been done, and would be practical, to put the wrecker in a position of facing toward [10] the East, with its wheels entirely on the shoulder, or the right wheels on the edge of the pavement, hooking on to the rear of the trailer and then proceeding on parallel to the road eastward and pulling the trailer on to the highway in that fashion I have described by placing the tow wrecker on the blackboard, which indicated the road, in that manner. This wrecker would not have had to be on the road, or main travelled portion of the road, at all, and a brace could be put against the side of the wrecker—a very simple operation. These

(Testimony of William L. Bellinger.)

wreckers can pull out these Interstate Truck Line trucks on to the road, they are so powerful. We make that offer of proof.

Mr. Hanson: We object for the same reason. The wrecker used in the demonstration is not the same. The Page wrecker had two booms, and of course, our main objection goes to the fact there is no evidence showing this man saw what those conditions were there, no evidence where this trailer was or as to the weight of the trailer. It seems to me it is the foundation of the general rule that a witness, an expert or non-expert, can not give an opinion as to the ultimate fact which is to be decided by the Court or jury, whether a person was negligent or whether a structure was safe. There is a whole line of cases on that. I think that is the general rule.

As far as the custom is concerned, there is no evidence here of custom of wreckers from which the State of Nevada determines how you should act and what you should do and no [11] evidence if a person follows a certain custom, that would relieve him of liability if he violated the law. We do not contend that Mr. Wright can not argue all he wants to to the jury a man could have done this thing a different way, but to put this man and in effect ask him to testify on the very ultimate fact to be decided by the jury, he can not do that. We object on those grounds and the grounds heretofore mentioned.

Mr. Wright: May I be heard, your Honor? I

(Testimony of William L. Bellinger.)

think it is pretty well known where the statute says with reference to parking on the highway and that does not say anything about flares or flagging or anything of the customs that you might comply with, being off the road or the necessity as to whether or not you should put out flares or flagmen. The law requires ordinary care in that respect and also in cases where there is a question of custom or practice, that is admissible. We have some places where there is a custom existing, you must comply with the custom or practice existing and others are different, with reference to established custom or practice of putting out some warnings, flares, flagmen, road warning, something of that nature.

Then with reference to the mechanical operation, whether it could be done or could not be done, and whether possible or not possible, we feel that is a subject for expert testimony. Lay people do not know the mechanical operation of that.

The Court: That is true, but one does one way [12] and one another way. The ruling of the Court, therefore, remains the same.

Mr. Wright: I have no other questions of Mr. Bellinger.

TESTIMONY OF JOE MENDIVE

November 9, 1955

Direct Examination

Q. (By Mr. Wright): Your name is Joe Mendive?

A. Yes.

(Testimony of Joe Mendive.)

Q. For the sake of the record, how old are you?

A. Thirty-one.

Q. You live in Elko, Nevada? A. I do.

Q. You have lived in Elko, Nevada, I believe, all your life? A. I have.

Q. You work for the Warren Motor Company?

A. I do.

Q. That is the garage of the Ford Motor Company, or the dealer in Fords and Ford garage in Elko, Nevada? A. That is right.

Q. How long have you been working for the Warren Motor Company in Elko, Nevada?

A. Five years.

Q. What type of work have you been doing those five years?

A. Car repair and service, greasing, etc., and operating wrecker. [13]

Q. The Warren Motor Company has a wrecker, you say? A. Yes sir.

Q. How long have they had the wrecker, or has it been at least during the entire service of your work?

A. It has been there since I have been there.

Q. And you say you have operated the wrecker during that period of your employment?

A. Yes.

Q. You are acquainted, I take it, with U. S. 40 from Elko to Wells, are you not? A. Yes.

Q. And had you ever operated a wrecker over that stretch of road before December 31, 1954?

A. I have.

(Testimony of Joe Mendive.)

Q. Now calling your attention to December 31, 1954, do you recall receiving a call or notification to go to somewhere near Wells, Nevada, to answer a call concerning an automobile? A. Yes.

Q. Could you say about what time? Was it some passing motorist or what?

A. A motorist came through and requested that we go 33 miles east of Elko, between ten and ten thirty.

Q. Was it from information that you got that this motorist had travelled about 33 miles to Elko before he notified you?

A. Yes, the people that went off the road didn't realize they [14] were closer to Wells than Elko. They thought Elko was closer, consequently we got the first call.

Q. Then did you proceed with the Warren Motor Company wrecker towards Wells? A. I did.

Q. Anybody with you? A. No, by myself.

Q. And that wrecker, tell us whether it had dual wheels in back? A. F-5 Ford truck with duals.

Q. Has duals in back and single in the front, I take it? A. Yes.

Q. About how much did that wrecker weigh?

A. Approximately seven thousand pounds.

Q. That would be approximately about 3½ tons?

A. Yes, all equipped and everything.

Q. As you went on towards Wells, tell us the condition of the roads as you left, not every foot of the way, but just generally.

A. Slick all the way, icy.

(Testimony of Joe Mendive.)

Q. And when you got approximately 14 miles east of Elko, Nevada, how were the roads?

A. Still slick.

Q. Did you come upon a scene of some car that had gotten itself where it needed a towing job or something like that? Just answer yes or no. [15]

A. I did.

Q. About how far from Wells, Nevada, was that?

A. About 14 miles.

Q. And with reference to any hills, can you identify it? A. Yes, up a hill.

Q. Was it towards the bottom, in the middle, or upper portion of the hill?

A. Towards the bottom portion.

Q. When you arrived, you were coming from Elko going eastward towards Wells, Nevada, is that correct? A. Yes.

Q. Did you stop?

A. Stopped at the scene of the accident.

Q. And an accident had occurred?

A. Yes, sir.

Q. When you stopped, did you stop on your left-hand side, which would be the north side of the road, or your right-hand?

A. When I stopped, I pulled over across the north side, as far over as I could without going off the bank.

Q. You stopped then on your left side, which would be your north side, is that correct?

A. Yes, sir.

(Testimony of Joe Mendive.)

Q. Now when you stopped, where was it with reference to the scene of the accident?

A. Approximately parallel.

Q. How close with reference—— [16]

Mr. Hanson: Scene of the car or accident?

Q. Well, relating to the car that was off the road?

A. About twelve feet.

Q. Now about what time did you arrive?

A. Approximately the hour was 11:30.

Q. In the morning?

A. Yes, sir.

Q. And what automobiles did you notice?

A. I saw the DeSoto first and on pulling up to the side I noticed the Ford and trailer, which I originally came for.

Q. What kind of a trailer?

A. A U-Haul, National U-Haul.

Q. Did you see a wrecker known as the Page wrecker?

A. No, sir, no wrecker there.

Q. Then later was there any ambulance came?

A. The ambulance came within ten minutes after the time I arrived there, about ten minutes.

Q. Then did you learn—was there anything to indicate an accident had occurred, or a collision had occurred?

Mr. Hanson: We can stipulate to that.

Mr. Wright: I am trying to bring out if he arrived after the collision.

A. Two truck drivers standing on the side of the road told me what happened. People were in this car, waiting for the ambulance.

Q. The people that were injured in the car? [17]

(Testimony of Joe Mendive.)

A. Yes, sir.

Q. And then you towed in one of the cars afterwards? A. Yes, sir.

Q. That was which one? A. The DeSoto.

Q. The '55 DeSoto? A. DeSoto, yes, sir.

Q. Did you get the name of the people involved, or the name of the owner of the DeSoto?

A. Yes, sir.

Q. When you stopped, where were the right wheels of your car with reference to the north side of the road?

Mr. Hanson: Objected to as immaterial.

The Court: I was just going to object myself, if you are going through with much of it.

Q. When you stopped, what did you do?

A. On arriving there, I seen what happened, so I struck two flares and went up west up the hill and put one and took the other up further, didn't get over the top, and coming back, the ambulance showed up.

Mr. Hanson: Objected to as immaterial, after the accident. I move to strike.

The Court: Granted. What this man did has no bearing on what may or may not be negligence.

Mr. Wright: That is true. It is only showing his [18] ability to observe the hill as he went up.

Q. Well, you say you went up the hill. Now did you observe the west slope of that hill from where you stopped, which you said was about opposite those vehicles. Did you observe that hill on the west slope, up towards the cars?

(Testimony of Joe Mendive.)

Mr. Hanson: We object—what he observed after the accident has no connection.

The Court: Counsel, we have exhibits in here which show the visual aspects of this area. It is true they were taken some time after the accident. We have parties who testified to the same thing. It seems to me this is cumulative.

Mr. Wright: I didn't want to lead the witness. I wanted to ask him about covering, if any, of the highway.

The Court: Whether or not there were any obstacles that would destroy vision?

Mr. Wright: No, as to what might cover that portion of the road, snow or ice.

The Court: Well, let us get going.

Q. As you approached the scene, and as you stopped and walked up the highway there, did you notice any ice or covering on the highway, and if so, what did you notice?

The Court: What was the condition of the highway, that is the proper question.

A. The condition of the highway was icy. [19]

Q. Can you say how far?

A. As far as I could see to the top of the hill.

Q. And then, of course, the ambulance arrived?

A. Yes, sir.

Q. And then you towed the vehicles out?

A. Yes, sir.

Q. And I think you said you towed the '55 DeSoto to Wells, Nevada?

A. I did.

Q. When you arrived at Wells, Nevada, did you

(Testimony of Joe Mendive.)

see a tow wrecker—you took the '55 DeSoto automobile to the Page garage in Wells? A. I did.

Q. Are you acquainted with the Page Garage in Wells, Nevada? A. Yes, sir.

Q. When you took the '55 DeSoto up to the garage, did you see a wrecker there?

A. The Page wrecker was parked in front.

Q. And did you look at the wrecker?

A. I took a look as I went by and then pulled off. The left rear end was smashed in, of the fender.

Q. Did it have any wording on it to indicate it was the Page wrecker?

Mr. Hanson: Did you say wording?

Q. Or printed matter. Now, Mr. Mendive, what was the color of [20] that wrecker you saw?

A. It was two-tone, white on top, faded blue on the bottom.

Q. You say it was faded blue on the bottom?

A. Yes, sir.

Q. Did you tow the small U-Haul trailer from off the north shoulder back on to the highway?

A. I did. I put it across the road on the other side off the highway.

The Court: What do you mean across the road? Do you mean from the north to the south side?

A. North to the south side, sir.

Q. Now as you approached the disabled vehicles to the west of it, in that immediate area, what was the condition of the surface there?

A. I don't understand.

(Testimony of Joe Mendive.)

Q. As you approached within a half mile or mile of the disabled vehicles, as you came from Elko, going eastward, before you arrived there, what was the condition of the road surface?

A. It was icy.

Q. Tell us with reference to whether or not you were able to park on the north shoulder of the road.

A. I did.

Mr. Hanson: Objected to as irrelevant and incompetent and not bearing on the facts in this case.

The Court: Well, he answered. The witness said he did. [21]

Q. Mr. Mendive, you took in the DeSoto car, did you not, into Wells? A. I did.

Q. So necessarily, of course, you went over the road. About how long after you arrived that you took the DeSoto into Wells?

A. From the time I arrived until I got to Wells in three-quarters or an hour.

Q. About what time did you leave the scene with the DeSoto car. A. Near noon.

Q. As you went up over the hill, describe the condition you saw on top and the condition on into Wells.

Mr. Hanson: That was several hours after the accident happened. We object to it. It is immaterial and irrelevant. The condition might not be the same.

The Court: The witness has testified as to the condition at the scene of the accident. What the condition was into Wells past the accident, other

(Testimony of Joe Mendive.)

than the immediate area, it seems to me is immaterial.

Mr. Taber: Mr. Page has testified for a mile or a mile and a half east of the scene of the accident that the highway was packed with snow, with the exception of 100 to 200 feet and we deem it highly material, the condition of the highway from the scene of the accident on into Wells.

The Court: Well, I frankly think——

Mr. Hanson: It is two hours later. [22]

The Court: I am going to permit the question to be answered.

A. After you got over the top of the hill it was almost perfectly dry all the way into Wells, except for two little patches.

Cross Examination

Q. (By Mr. Hanson): You work for the Warren Motor Company in Elko? A. Yes, sir.

Q. You also have a wrecker service?

A. For three years.

Q. You compete with Mr. Page for service in that area? A. No, no competition in it.

Q. You both go out together?

A. We have our boundary limits as to where we go out.

Q. Was it thawing at all when you got on the scene? A. Yes, sir.

Q. You got there about 11:30?

A. As near as I can figure.

Q. And it was warming up at that time?

(Testimony of Joe Mendive.)

A. Yes, sir.

Q. You could see the wreck for how far before you got to it?

A. I could see it good pretty near a mile anyway.

Mr. Hanson: That's all.

Mr. Wright: No questions.

[Endorsed]: Filed April 30, 1956. [23]

[Endorsed]: No. 15186. United States Court of Appeals for the Ninth Circuit. Jennie R. Duff and Elizabeth Bronson, Appellants, vs. H. L. Page, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed: July 11, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For The Ninth Circuit

No. 15186

JENNIE R. DUFF and ELIZABETH BRON-
SON, Appellants,

vs.

H. L. PAGE, Respondent.

STATEMENT OF POINTS ON WHICH AP-
PELLANTS INTEND TO RELY ON AP-
PEAL

Point I

The District Court erred in refusing to ask the Jurors if they owned any stocks or bonds in the American Casualty Co.

Point II

The District Court should have allowed appellants the right to get the full explanation from the witness, Earl Remington, concerning his opinion that Duff was driving too fast.

Point III

The District Court erred in refusing appellants the right to show that it was practicable to do the towing job without getting on the traveled portion of the highway and that appellee did not need to use so much of the highway.

Point IV

The District Court erred in refusing to admit

offered testimony as to the custom and usage of putting out flags and other warnings.

Point V

The District Court erred in giving Instructions No. 12 and No. 19, to which the appellants objected.

Point VI

The District Court erred in refusing to give the the appellants' offered instructions Nos. A to M, inclusive.

Point VII

The District Court erred in refusing to grant appellants' Motion to Strike the Appellee's Statement that the tow truck was an emergency vehicle.

Point VIII

There was insufficient evidence to justify any or all of the verdicts entered on November 15, 1955, and said Verdicts were against Law.

Point IX

The District Court erred in refusing to grant appellants' Motion for a New Trial, filed November 22, 1955.

WRIGHT & EARDLEY,

/s/ By ROSS P. EARDLEY,

Attorneys for Appellants.

Certificate of Mailing Attached.

[Endorsed]: Filed July 18, 1956. Paul P. O'Brien.



No. 15186

United States
Court of Appeals
For the Ninth Circuit

JENNIE R. DUFF and ELIZABETH BRONSON, Appellants,

vs.

H. L. PAGE,

Appellee.

Brief of Appellants

Appeal from the United State District
Court for the District of Nevada

FILED

MAY 13 1957

PAUL P. O'BRIEN, CLERK



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OPENING BRIEF OF APPELLANTS

I

Statement as to Jurisdiction of Court

This is an action based on negligence and was originally brought in the District Court of the United States, in and for the District of Nevada, Northern Division, by John A. Duff and Jennie R. Duff, his wife, and Elizabeth Bronson, Plaintiffs, against H. L. Page, Defendant, for the recovery of damages in excess of \$3000.00 for injuries alleged to have been suffered by plaintiffs by reason of a certain automobile collision. At the time of the commencement of said action plaintiffs, John A. Duff and Jennie R. Duff, his wife, were citizens of the State of Idaho, and the plaintiff, Elizabeth Bronson, was a citizen of the State of California, and at the time of the commencement of said action defendant, H. L. Page, was a citizen of the State of Nevada.

The District Court had jurisdiction of this matter on the basis of diversity of citizenship, and the amount sued for, exclusive of interest, being in excess of \$3000.00, all pursuant to statutory authority found in 28 USCA, Section 1332. The facts necessary to show the jurisdiction of the District Court, as set forth above, were plead by the plaintiffs in their Complaint For Damages as now found in the Transcript of Record at the following pages:

- page 3: Allegations as to the citizenship of the parties
- page 5 and 6: Amount sued for by plaintiff, John R. Duff
- page 7: Amount sued for by plaintiff, Jennie R. Duff
- page 9: Amount sued for by plaintiff, Elizabeth Bronson

A statement of the Jurisdiction of the District Court is also found in the Pretrial Order at page 23 of the Transcript of Record.

The United States Court of Appeals for the Ninth Circuit has jurisdiction to review the judgments herein appealed from (page 45, Transcript of Record) by reason of the fact that the same are final judgments and by the au-

thority of the statutory provisions found in 28 USCA, Sections 1291 and 1294, which sections provide, in substance, that the courts of appeal shall have jurisdiction of appeals from the final decisions of the District Courts of the United States and that the appeal be taken to the Circuit Court embracing the district in which the District Court in question is located. Reference is hereby made to the Notice of Appeal filed herein (pages 45 and 46, Transcript of Record).

II

STATEMENT OF THE CASE

This action was brought by plaintiffs, John A. Duff and Jennie R. Duff, his wife, and Elizabeth Bronson, to recover damages for personal injuries sustained by them on the 31st day of December, 1954, when a 1955 DeSoto automobile, in which they were riding, collided with an auto wrecker owned and operated by the defendant, H. L. Page. The original pleadings were the Complaint of the plaintiffs, the Answer and Counterclaim of the defendant and the Reply to Counterclaim filed by the plaintiffs. Since the Counterclaim is not at issue in this appeal, no further reference to the same will be made. These original pleadings were superceded by the Pretrial order of the District Court (page 23 Transcript of record) and the amendments thereto (page 37, Transcript of Record).

The agreed facts are that about the hour of 10:00, A.M., on the 31st day of December, 1954, defendant was in the process of removing an automobile and trailer from a snow bank off the north side of Highway No. 40, a public highway, at a point approximately fourteen miles west of Wells, Nevada, and at said time and place had his 1941 Studebaker wrecker parked in the west bound traffic lane of said highway; that the plaintiffs were proceeding west in a 1955 DeSoto automobile owned and driven by plaintiff, John A. Duff. The plaintiff, Jennie R. Duff, the wife of plaintiff

John A. Duff, was riding in the back seat and the plaintiff, Elizabeth Bronson, was seated in the front seat next to the driver. There was a straight approach of highway of approximately .4 miles from the east, with a down grade of 3.34% toward the parked wrecker. The road was oil surfaced and approximately 43 feet wide with a broken white painted center line including about 7½ feet of mixed oil and gravel shoulder on the north side and 8 feet of shoulder on the south side. The day was overcast. The DeSoto automobile at said time and place collided with the Studebaker wrecker and the plaintiffs suffered personal injuries as a result thereof.

In addition to the above facts, the plaintiffs allegations and contentions are that the injuries to the plaintiffs were a proximate result of the negligence of defendant in that the wrecker was almost 17 feet in length and parked on the highway illegally and contrary to Section 4365, **Nevada Compiled Laws, 1929**, and parked almost straight across the west bound traffic lane with its front end almost to the white center line on the highway, it's rear end extending to the beginning of the oil and gravel north shoulder; that there were no signals, flares, signs, or other warnings on the wrecker, or on or near the highway; that there was no need or reason for the wrecker to be parked blocking the west bound traffic lane, but that the wrecker could have accomplished its business by parking off the main traveled portion of the highway; that the negligence, if any, of John A. Duff, the driver of the 1955 DeSoto automobile, was not the sole proximate cause of the accident; that the plaintiffs, Jennie R. Duff and Elizabeth Bronson, and each of them, were free from contributory negligence.

To the allegations and contentions of the plaintiffs, the defendant answered that he was lawfully parked on the highway in pursuit of the business for which he had been called; that a red blinker light was on the wrecker and in

full operation; that the plaintiffs, as they approached, had a clear unobstructed view down the highway to the west toward the wrecker of approximately .4 miles; that the road was wet but presented a safe driving surface; that the collision was due entirely to the negligence of the plaintiffs and that the defendant was not negligent, or that, in any event if the defendant was negligent, his negligence was not a proximate cause of the collision and injuries to the plaintiffs. Defendant raised the following defenses against the plaintiffs Jennie R. Duff and Elizabeth Bronson, who are the appellants herein:

1. General denial of negligence on the part of the defendant
2. Contributory Negligence on the part of Jennie R. Duff and Elizabeth Bronson.
3. That the sole negligence of plaintiff John A. Duff, was the proximate cause of the collision and injuries, or the concurrent negligence of John A. Duff plus the contributory negligence of Jennie R. Duff and Elizabeth Bronson, was the proximate cause of the collision and injuries.
4. That if defendant was negligent his negligence was not the approximate cause of collision and injuries, but that the same was caused by the sole negligence of John A. Duff, or concurring negligence of John A. Duff and contributory negligence on the part of Jennie R. Duff and Elizabeth Bronson.
5. That the injuries of Jennie R. Duff and Elizabeth Bronson were due to the failure of John A. Duff to observe the last clear chance rule.
6. That the accident was unavoidable.

Commencing November 7, 1955, the above matter was tried before a jury in the District Court on the basis of the

above allegations and agreed statement of facts as the same were set forth in the Pretrial Order of the District Court (Page 23, Transcript of Record) and the amendment thereto (Page 37, Transcript of Record).

Before the trial commenced the plaintiffs handed to the presiding Judge, John R. Ross, a paper designated "Questions requested by plaintiffs of Jurors." That one of the questions was, "Do you own any stocks or bonds in the American Casualty Co." (page 37, Transcript of Record). The Judge indicated he would not ask the said question and in fact did not ask the said question, or any similar question, of the prospective jurors, nor did counsel for plaintiffs have the opportunity to ask said question of the prospective jurors, although plaintiff pointed out to the Court in chambers that said question was a proper question to be asked of the prospective jurors.

During the course of the trial, defendant's attorney, on cross examination, asked plaintiffs' witness, Earl Remington, if it were not a fact that the plaintiff, Duff, was driving too fast under those conditions and witness answered, "Yes." (Page 168, Transcript of Record). On redirect examination, plaintiff tried to ask questions to show what the witness meant by such a statement, but the defendant objected and the Court sustained the objections. (Page 169, Transcript of Record).

Also on several occasions during the course of the trial, plaintiffs attempted to introduce evidence from expert witnesses as to the customary manner of towing a trailer onto the highway and to show that it was practical to do the towing job without getting on the traveled portion of the highway, but the Court in each instance refused plaintiffs the right to introduce such evidence. (Transcript of Record, pages 352-361). Plaintiffs also attempted to intro-

duce evidence to show the custom and usage of putting out flags, or other warning devices, but in each instance the Court refused plaintiffs the right to introduce such evidence. (Transcript of Record, page 357).

When the defendant, H. L. Page, was testifying he volunteered the statement that his tow truck was an emergency vehicle. (Transcript of Record, page 78). Thereafter the plaintiffs moved to have this answer stricken as the conclusion of the witness, but the same was denied by the Court (Transcript of Record, page 78 and page 306).

At the settling of the instructions, plaintiffs took exception to Instruction No. 12 offered by the Court (Transcript of Records, page 307) and also offered Instructions numbered A through M, which instructions were refused by the Court. (Transcript of Record, page 309).

The matter was submitted to the Jury, which rendered a verdict in favor of the defendant and against the plaintiffs, each of them, and thereupon, on November 16, 1955, judgment was entered in favor of the defendant and against the plaintiffs, and each of them. (Transcript of Record, page 40). On November 22, 1955, plaintiffs filed a Motion for a New Trial (Transcript of Record, page 43) which motion was denied by the Court on March 5, 1956 (Transcript of Record, page 44). Thereafter, on April 11, 1956, two of the plaintiffs, Jennie R. Duff and Elizabeth Bronson, filed their Notice of Appeal from the judgment entered against them and from the Order Denying Motion for New Trial (Transcript of Record, page 45).

III

SPECIFICATION OF ERRORS

1. It was error for the District Court to refuse to ask the Jurors if they owned any stocks or bonds in the American

Casualty Company. Before the trial commenced, the plaintiffs, in writing, specifically asked the trial Judge to ask this question in the voir dire examination of the Jurors on the grounds that said question was a proper question and necessary to determine the qualifications of the Jurors and the exercise of the peremptory challenge. The District Judge refused to give this question. Transcript of Record, page 37).

2. It was error for the District Court to refuse appellants the right to get the full explanation from their witness, Earl Remington, concerning his statement that John A. Duff was driving too fast. On cross examination Earl Remington testified as follows:

- Q. You remember at the time you saw this car you were on an icy hill? A. Yes.
- Q. You knew at that time that the car was travelling too fast for those conditions? A. For those conditions at that particular spot, yes sir.
- Q. It was traveling too fast when it came over the hill on the ice? A. Yes.
- Q. That is the reason you blinked your light, because it was going too fast to go around the wrecker? A. I blinked my lights to avoid an accident.
- Q. You knew he was going too fast to control the car and go around the wrecker? A. That I wouldn't say.
- Q. In fact you told Mr. Page, after the accident, when you walked down to the scene, the reason you blinked your lights was because the man was traveling too fast for the road conditions? A. That is right.
- Q. And that is just your opinion? A. Yes, just my opinion at the time, 45 or 50 miles was too fast for the existing conditions. (Transcript of Record, page 168).

On re-direct examination appellants attempted to have Mr. Remington give a full explanation of his statements on

the grounds that when one party brings out a matter the other party is entitled to have such testimony, or inference, explained. The defendant objected and the Court sustained the objection:

Q. Now after you got the vehicle stopped and got up over the crest of the hill to Wells, how was the condition? Tell us what the customary speed would be over the hill?

Hansen: Objected to as having no bearing.

Wright: Probably not sufficient foundation.

The Court: I am going to sustain the objection, I do not see where it is relevant.

Wright: It is this, if the Court please, a person is going along and that is what we want to bring out, on top of the other side.

The Court: What do you mean, other side?

Wright: East of the crest.

The Court: What this witness's customary speed and a person should maintain going over the crossing—objection sustained. (Transcript of Record, page 169).

3. It was error for the District Court to refuse appellants the right to show that it was practicable to do the towing job without getting onto the traveled portion of the highway and that appellee did not need to use so much of the highway and that it was the custom and practice in the towing business to stay off the traveled portion of the highway whenever practicable. Appellants called the witness, William Bellinger, qualified him as an expert towman and attempted to show the existence and nature of the above mentioned customs, that the same was objected to by the defendant and the Court sustained the objections as follows: (for full substance of this testimony see Transcript of Record, page 352 to page 356).

Thereafter appellants made an offer of proof as to the above mentioned customs and practices—which offer is found at page 356 to page 360 of Transcript of Record.

The defendant objected thereto and this objection was sustained by the Court. The grounds of defendant's objections are fully set forth in Transcript of Record, pages 360 and 361.

(The above testimony, offer of proof and objections thereto are not set out in full herein because of their considerable length and we have, therefore, referred the Court directly to the Transcript of Record; this entire sequence of testimony commences in the Transcript of Record at page 352 and ends on page 361).

4. It was error for the District Court to refuse to grant appellants' Motion to Strike from the record the appellee's statement that the tow truck was an emergency vehicle.

The appellee testified on cross examination as follows:

Q. Why did you put this red light on, Mr. Page?

A. It is an emergency vehicle.

Mr. Taber: I move the answer be stricken as conclusion of the witness.

The Court: It may stand (Transcript of Record, page 78)

Also at the conclusion of all the evidence, appellants moved to strike the answer of defendant, Page, that the wrecker he was driving was an emergency vehicle, on the ground that it was the conclusion of the witness, that it was unresponsive and that as a matter of law, the tow truck was not an emergency vehicle. (Transcript of Record, page 306).

5. It was error for the District Court to refuse to admit

offered testimony as to the custom and usage of putting out flags and other warnings. Appellants called the witness, William Bellinger, qualified him as an expert towman, and made an offer of proof to show that the witness was familiar with the custom in reference to the use of warnings and that the custom was as follows:

"One custom is if it is possible to do the work off the entire road, that practice and custom is that the wrecker stays off the traveled portion, or shoulder of the highway. Second, if he cannot do the work there, then the custom is that the wrecker stays on the shoulder and if it stays on the shoulder, that warnings are put out on each side of the wrecker, consisting of flags, or flares, or road signs, "Danger"; that they are put on each side of the wrecker and there is a custom that they have to take into consideration the hilly surface of the highway, whether it is curved or hills, or brow of the hill. That to put the trailer up on the road, it can work on the shoulder and get on the pavement but must keep out different flares as warnings. That the custom is that if there is a hill within half a mile, with ice, or slippery, that warnings, consisting either of flares or signs similar to the 'Danger Ahead' signs, or little flags, or other warnings or flagmen, is placed upon the top of the hill where the vehicle can see it as it comes over the crest. That it is the custom and practice that is recognized in that vicinity. Also the practice is that where there is an icy surface, then you go farther away from the vehicle and if on the crown of a hill, you go farther away with the signs. In other words, before a vehicle approaching comes to that point where there is a curve within half mile, or top of the hill within half mile that is true". (Transcript of Record, page 357-358)

Appellee objected to this offer on the grounds that a

witness cannot give an opinion as to the ultimate fact to be decided by the jury, and that there was no evidence of the custom of wreckers. This objection was sustained by the Court. (Transcript of Record, pages 360-361)

6. The District Court erred in giving Instruction No. 12, which is as follows:

General human experience justifies the inference that when one looks in the direction of an object clearly visible, he sees it, and that when he listens, he hears that which is clearly audible. When there is evidence to the effect that one did look, but did not see that which was in plain sight, or that he listened, but did not hear that which he could have heard in the exercise of ordinary care, it follows that either there is an irreconcilable conflict in such evidence or the person was negligently inattentive. (Transcript of Record, page 321)

The appellants objected to this instruction as follows:

"If the Court please, the plaintiffs wish to take exception to No. 12. This instruction deals with the general subject of the duty to look, see objects clearly visible. Under the circumstances, we think it should not be given, because of the ice, the passing truck, the blending of the wrecker with the highway, and it is not applicable. In this connection, if this instruction is given, we believe that we have prepared an instruction to define what is clearly visible, that whether an object is clearly visible depends on all the surrounding circumstances. There isn't anything to define what is clearly visible. Some people might think that standing on the highway is clearly visible and looking up when that person is driving down the road. Under those same circumstances the test is whether or not the object is clearly visible. We would ask the Court at least that modification." (Transcript of Record, page 307)

7. The District Court erred in refusing to give appellants' offered Instruction A, as follows:

The plaintiffs have the right and the law encourages them to join their actions. You are to determine the rights of each plaintiff to recover as though each case was a separate action. In this connection you should apply the law and facts to each case, separately, without regard to the other cases. (Transcript of Record, page 343)

8. The District Court erred in refusing to give appellants' offered Instruction G:

You are instructed that a wrecker truck or tow truck is not an emergency vehicle. (Transcript of Record, page 346)

9. The District Court erred in refusing to give appellants' offered Instruction I:

You are instructed that the Laws of Nevada, Section 4365 of the **Nevada Compiled Laws**, provide as follows: "No person shall stop an automobile, nor permit it to remain standing, on the main traveled portion of any highway for a length of time greater than is reasonably required to make adjustments or repairs; provided, that where there is room to make such adjustments or repairs the motor vehicle shall be driven entirely off the main traveled portion of the highway."

You are instructed that the above law applies to trucks or tow trucks.

In weighing the evidence in this case, you will be guided by a rule now to be stated: When it has been established by the evidence that a person did stop, or leave standing, any vehicle upon the main traveled portion of a highway, and that at such place there was room to have parked said vehicle off of the main traveled portion of the highway, then such evidence is a prima facie

showing of negligence on the part of the person so handling the vehicle and will support a finding that he was negligent in such conduct, unless that showing, together with any other proved facts that support it fails to preponderate over evidence that it was impracticable to stop, or park or leave the vehicle off the main traveled portion of the highway.

In other words, the law places upon a person who stops a vehicle on a main traveled portion of a highway, the risk of being found to have been negligent in so doing, unless he affirmatively shows the impracticability or the impossibility, just mentioned, of handling the vehicle otherwise." (Transcript of Record, page 346)

10. The District Court erred in refusing to give appellants' offered Instruction J:

The operator of a motor vehicle is required to use ordinary care in keeping a lookout to see that which is plainly or clearly visible. When there is evidence to the effect that one did look, but did not see that which was in plain or clear sight, it follows that either there is an irreconcilable conflict in such evidence or the person was negligently inattentive.

Whether an object is clearly or plainly visible is a question of fact to be determined from all of the surrounding circumstances. (Transcript of Record, page 347)

11. The District Court erred in refusing to grant appellants' Motion for a New Trial, for the following reasons:

- a. Insufficiency of the evidence to justify the verdicts against the appellants, and the verdicts were contrary to the evidence.
- b. That the verdicts, against the appellants were against law.
- c. Errors in law occurring at the trial and excepted to

by the appellants as more specifically set forth in specification of errors.

- d. Orders of the Court by which appellants were prevented from having a fair trial as more specifically set forth in this specification of errors. (Transcript of Record, pages 42-44)

IV. ARGUMENT

1. It was error for the trial Court to refuse to ask the jurors on voir dire examination if they owned stocks or bonds in the American Casualty Company.

As was pointed out in the Specification of Errors and also at page 37 of the Transcript of Record, appellants made written request of the Court to ask this question and the Court did not do so, nor did it give appellants the chance to ask said question or any similar question. Appellants pointed out to the Court that it was necessary to ask this question to determine the qualifications of the jurors and to determine the exercise of the peremptory challenge. Appellants had the right to have such a question asked.

"It is generally the rule that a juror may be questioned on voir dire with respect to any interest in, or connection with, an insurance company, or its representatives, where the case is one in which such a company may be concerned, in order to ascertain any bias, prejudice, or interest in the case; that such examination is not improper although it incidentally discloses to the juror that an insurance company is, or may be, interested in the result of the action."

50 C.J.S., page 1046

There is also an excellent note on this subject in 56 **A.L.R.**, page 1454. At page 1456 the note concludes as follows:

"The overwhelming majority of Courts sustain the right

of counsel for plaintiff in a personal injury case, so long as he acts in good faith for the purpose of ascertaining the qualifications of the jurors, and not for the purpose of informing them that an insurance company is back of the defendant of record, to interrogate prospective jurors by one form or another of questions, with respect to their interest in, or connection with, indemnity insurance companies. **It has been held error to deny plaintiffs counsel the right to qualify the jurors in this respect."**

This A. L. R. note is supplemented by three subsequent annotations each affirming the above statement and citing numerous cases from nearly every jurisdiction including the Federal Courts.

74 A. L. R. 860

95 A. L. R. 404

105 A. L. R. 1330

The last supplemental note in 105 A. L. R. 1330 states:

"Additional support for the **almost universal view** that in personal injury cases and death actions, a plaintiff may in good faith interrogate the jurors on voir dire as to their possible connection with, or interest in, liability insurance companies is found in the following cases—(Thereafter are cited many cases)"

It is also clear that plaintiff has the right to make this inquiry in reference to a specific insurance company. While some Courts have held that the question must be asked in such form as to only refer to insurance companies generally, it is the general view the plaintiffs may ask about a specific company. Referring again to the above mentioned A.-L. R. notes and specifically to 74 A. L. R., page 866:

"It is settled that the right of the plaintiff discussed in the last sub-division may be exercised with specific re-

ference to a designated insurance company, which may be mentioned by name. This is evident from the many cases which have allowed inquiry as whether the jurors were interested in a designated insurance company". The supplemental notes are to the same effect.

95 **A. L. R.** 407

105 **A. L. R.** 1332

Among the many cases supporting this rule are the following:

Maggart v. Bell, (Cal. 1931) 2 Pac. (2nd) 516

Nordyke v. Pastrell, (Nev. 1932) 7 Pac. (2nd) 598

Wagner Elec. Corp. v. Snowden, (C.C.A. 8th, 1930) 38 Fed. (2nd) 599

In the last mentioned Federal case the question was asked if the jurors owned any stocks or bonds in the American Mutual Liability Insurance Company. In considering the question on appeal the Circuit Court said at page 600:

"If, as appears in this case, the insurance company was interested in the defense, it would seem proper when good faith is shown to permit inquiry as to whether or not any of the prospective jurors were interested in that company or acquainted with any of its agents or employees."

Where the question has arisen as to the right of the Court to refuse to allow such a question to be asked, it has been held reversible error.

Smith v. Star Cab Co. (1929, Mo.) 19SW (2nd) 467

Pinter v. Wilson (1932, Mo.) 46 SW (2nd) 548

Gammilt v. Culverhouse (1927 Ala.) 114 So. 800

Appellants submit that the only real limitation on this

right is that the question be asked in good faith. There is nothing in this record to suggest, or even hint, that appellant was acting in bad faith. On the contrary there is every evidence and presumption of good faith. The named insurance company did have an interest in the case, the appellants told the Court they wanted to determine the qualifications of the jurors and did not ask that the question be asked of each juror individually but of the panel as a whole. Since the Judge would be asking the question there would be no undue emphasis placed on the same by association with either party. The mere fact that the question is asked, or that it may incidently reveal the existance of insurance is not evidence of bad faith. In this connection see:

Maggart v. Bell (Cal., 1931) 2 Pac. (2nd) 516

It is also held that where an insurance company is interested, good faith will be presumed.

Wendel v. City Ice Co. (1929, Mo.) 22 SW (2nd) 215

Ulmer v. Farnham, (1930, Mo.) 28 SW (2nd) 113

It should also be noted that the Court did not ask, or permit to be asked, any question whatsoever on this subject, completely denying any right whatsoever to appellants to determine the qualifications of the jurors in this respect. Even if the Court felt that the question which the appellants submitted was not the proper approach, then the Court should have asked the question in a different form. Appellants submit that it was prejudicial error for the District Court to refuse to ask this question, or to make any interrogatories of the jurors on this subject after it had been requested to do so by the appellants.

2. It was error for the Court to refuse appellants the right to get the full explanation from the witness, Earl Remington, concerning his opinion stated on cross-examination that Duff was driving to fast.

On the cross examination of Remington, as was quoted in the Specification of Errors and found on page 168 of the Transcript of Record, Remington expressed the opinion that Duff was driving 40 or 50 miles per hour and that was too fast for the existing conditions "at that particular spot." Remington has previously testified that he was traveling up the hill heading east and Duff was just coming over the crest of the hill heading west and that the road on the west side of the hill was icy (Transcript of Record, page 167-168). Appellants wanted to bring out on re-direct examination that Remington had no knowledge of the road conditions of the east side of the hill from whence Duff had just come, that his opinion as to Duff's driving too fast at that particular spot referred only to the icy part on the west side of the hill and that, since Duff had just come over the hill, it may have been that Duff was not driving too fast for the condition of the road on the east side of the hill. Appellants wanted to ask Remington what he found as to road conditions on the east side of the hill after he had driven over the crest, and whether Duff's speed was too fast under those conditions. (Transcript of Record, page 169). The Court refused to allow inquiry into this matter on the ground that it was irrelevant. It could have been brought out from Remington that the road on the east side of the hill and all the way back to Wells, Nevada, from whence Duff had come, was dry and not icy and that Duff couldn't see and would have no reason to believe that there was ice on the other side of the hill until he had actually passed the crest; that Duff's speed of 45 or 50 miles per hour under those conditions was not too fast, that when Remington first saw Duff, Duff was just coming over the hill and had not had opportunity to reduce his speed before he hit the ice on the west side of the hill. Without this explanation on the part of the witness, it left a strong

impression on the jury that Duff was just simply driving too fast, in disregard of the road conditions. The jury was entitled to the full explanation of Remington's testimony about Duff driving too fast.

The principal of law applicable is that when one party brings out a matter, then the other party is entitled to have such testimony, or inference, explained.

"On re-direct examination a witness may properly be interrogated as to facts, and circumstances tending to refute, weaken, or remove inferences, impressions, or suggestions which might result from the testimony, or inquiries on cross-examination." 70 **C. J.** 702

Where a witness gave an opinion during defendant's cross-examination, the plaintiff could have the witness explain the facts on which the opinion was based.

State v. Gibson, 174 N.W. 34 (Iowa, 1919)

See also:

Wigmore on Evidence, Third Addition, Section 1044

Richardson v. Hoole, 13 Nev. 492, at page 498

Brosman v. Boggs, (Ore.) 198 Pac. 890, at page 892

Vern v. Butte Elec. RR Co. (Mont.) 249 Pac. 1070, at page 1072

Stubs v. Orpheum Theater and Realty Co., (Cal.) 300 Pac. 61, at page 62

In the last cited case, plaintiff brought action for alleged assault and battery. Plaintiff asked questions about the employees of defendant having been arrested on criminal charges and the defendant, over objection, was permitted to show the criminal charge was dismissed. That Court said at page 62:

"While it is true ordinarily that evidence of acquittal or dismissal of a criminal charge for assault and battery

is inadmissible in a civil action, and the same may be said of all evidence relating to the criminal charge. Here the appellant opened the door for the introduction of the testimony referred to by introducing evidence relating to the arrest and trial of the employee in the police Court **Appellant's evidence standing alone and unaccompanied by evidence of the result of those proceedings would tend to create the impression that the employee had suffered a conviction on the criminal charge. It would be manifestly unfair to respondent to admit the testimony offered by appellant without admitting the further testimony which would dispel the erroneous impression created. We find no error in admission of this testimony."**

It has been held error to exclude such testimony:

"It has been held error for the Court to exclude testimony in explanation of unfavorable evidence. The discretion of the Court in re-examination of witnesses does not go to the extent of authorizing a denial to a party of the right to explain discrediting facts brought out by the other side." 70 C. J., page 705.

Transcontinental Petroleum Co. v. Interocean Oil Co.
262 Fed. 278

Donaldson v. U. S., 208 Fed. 4

And so in this case the witness's statement standing alone tends to create a misleading and entirely false impression upon the minds of the jury and it is manifestly unfair and error on the part of the trial Court to refuse to admit further evidence as offered by appellants in order to obtain a full and complete explanation of the matter and to have the witness explain what he meant by his statements.

3. The Court erred in refusing appellants the right to show that it was practical to do the towing job without get-

ting on the main traveled portion of the highway and that defendant was using too much of the highway.

The testimony of the defendant was that when he arrived at the place where the accident eventually occurred, he placed his wrecker in a position almost directly across the westbound lane of traffic with the rear of the wrecker near the north shoulder of the road and the front of the wrecker only a few feet from the white center line. (Transcript of Record, pages 71 and 72). This was done for the purpose of turning the U-haul trailer upon its wheels and to eventually tow the said trailer back onto the road. The defendant testified that it was not practical to set the trailer on its wheels in any other way than to have his wrecker setting in such a position across the main traveled portion of the highway. (Transcript of Record, pages 297-303)

The appellants called William Bellinger and qualified him as an expert towman in the vicinity. (Transcript of Record, pages 350-352). Then appellants asked Mr. Bellinger questions to show:

- a. That there was a custom existing in the area as to towage of vehicles. (Transcript of Record, page 352)
- b. That the custom was to do a towing job whenever possible without getting on the main traveled portion of the highway. (Transcript of Record, pages 353-356)
- c. That in the towing job in question it was practical to do the job without getting on the main traveled portion of the road. (Transcript of Record, pages 353-356).

As more specifically detailed in the Specification of Errors, these questions were objected to by the defendant and the objections were sustained. Appellants then made an offer of proof to show that the practical, or standard,

practice would be to first put the trailer on its wheels while the wrecker was on the north shoulder, pointed west, and then tow the trailer onto the highway by heading the wrecker east and placing the wrecker on the north shoulder, and then towing the trailer up the embankment and along the shoulder of the road; that it would not be customary, nor necessary, to block the traveled portion of the road. (Transcript of Record, pages 356-360) This offer was objected to and sustained by the Court. (Transcript of Record, pages 360-361)

By refusing the appellants the right to submit the above offered testimony, it left the defendant's uncontradicted statement that there was no other practical way to do the towing job and greatly prejudiced the appellants on the question of the negligence of the defendant in placing his wrecker across the main traveled portion of the highway.

The law is well settled that a wrecker can only block the road where it is necessary and that if the work can be done without blocking the road, the wrecker must stay off the main traveled portion of the road. The Court so instructed the jury in Instruction No. 26 (Transcript of Record, pages 326-327)

The Court by refusing the appellants the right to submit evidence on the question of whether or not it was necessary for the wrecker to block the highway, in effect denied the appellants the right to prove the defendant was negligent and left the whole question of negligence to turn on the uncontroverted and self-serving statement of the defendant.

As to the appellants right to offer testimony of custom and usage by means of an expert witness, the general rule

is stated in the annotation at 137 **A. L. R.**, 611 as follows:

"As to usages or customs of persons generally, or of those engaged in a particular sort of business or occupation, the doctrine almost invariably upheld is that where reasonable minds may differ as to the question of negligence, proof of an existing general usage conforming to or differing from the practice followed by the defendant may properly be admitted in evidence for what it is worth. Such evidence, bearing on the question of the defendant's negligence has been regarded as admissible whether offered by the plaintiff or by the defendant. It is also admissible when tending to establish, or to disprove contributory negligence.

The evidentiary value of the proof of general usage is frequently very clear where the negligence complained of is the failure to use a safety device or other precaution against accident. **In such cases the general usage may serve to illustrate what safeguards were feasible and presumably known to the defendant."**

To the same effect is **Blashfield Encyclopedia of Auto Law**, Vol. 9, Par. 6186.5.

As to the right of an expert witness to testify whether it was practical to do the towing job by staying off the main traveled portion of the road—32 **C. J. S.**, page 235:

"A person who is specifically qualified by skill or experience may state an inference, or judgment, as to the matters connected with the management and operation of vehicles, machinery and other appliances concerning which the jury could not fairly be expected to draw accurate conclusions for themselves."

The question of towage, strength of equipment, practical method, usual method among towmen, standard methods are all the subject of expert testimony. Following are a

few of the many cases which hold that an expert can testify to the mechanical methods of doing work.

DeMargis v. Johnson, Mont. 3 Pac. (2nd) 283, Garageman permitted to testify as expert as to cause of loose spokes of wheel and method of inspection to ascertain defects.

Faulkner v. Mammoth Min. Co., Utah, 66 Pac. 799, miner with considerable experience could testify to manner of ascertaining that there were loose rocks in a mine shaft.

Limby v. Dock Gas Engine, Cal., 180 Pac. 671, expert can testify as to cause of flywheel breaking and method of inspection to discover defects.

Alameda County v. Tieslou, Cal., 186 Pac. 398, motorcyclist with considerable experience can testify as to best method of turning motorcycle.

Hockmen v. Sifers Candy Co., Kan. 178 P. 254, expert can testify as to practicability of safeguards and what safeguards can be used. Suit by employee v. employer for lack of safeguards.

Bowen v. Sierra Lumber Co., Cal. 84 Pac. 1010, expert can testify that train running over trestle will loosen nails.

Ind. Material Supply Co. v. Marshall, Okla., 264 Pac. 830, suit against roofer for defective roof. Defendant called expert to prove cause of defect, refused, held error and reversed.

Smith v. Dow, Wash., 86 Pac. 555, expert stevedore can testify as to proper manner to tie bundles lumber. Stevedore sued for injuries to lumber falling.

Jones v. Ch. M., & St. P. RR. Co., Wash., 172 Pac. 810, expert can testify as to manner of unloading logs.

Berkowitz v. Am. River Gravel Co., Cal., 215 Pac. 675,

expert can testify as to distance auto going 20 M.P.H. can stop.

It has been held that the manner of running, speed and stoppage of locomotives is proper matter for expert testimony. **Wright v. So. Pac.**, Utah, 49 Pac. 309; **Howland v. Oak Cons. Ry. Co.**, Cal., 42 Pac. 983.

Moore v. Norwood, Cal., 106 Pac (2nd) 939, expert can testify where ultimate fact to be proved is one of science, art, or trade.

Thomas v. Inland Motor Freight, Wash., 81 Pac. (2nd) 818, expert can testify that worn brake could cause wheel to lock and to have caused accident.

Zandan v. Atl. Coast Line Ry. Co., S. C. 190 S.E. 817, expert can testify in accident that auto left unattended could not have moved unless engine left running, or intervention of third party.

Acme Poultry Corp v. Melville, Md., 53 A. (2nd) 1, state police officer can testify that tires leave marks if a vehicle is pushed sideways.

Zelayeta v. Pac. Greyhound Lines Co., 232 Pac. (2nd) 572, expert investigator can testify as to point of impact of bus and auto.

Los Angeles and S.L.R. Co. v. Umbaugh, Nev., 123 Pac. (2nd) 224, expert can testify as to approximate stoppage distance of train and train made up as described was going approximately so many miles per hour under those conditions.

Alward v. Poola, Cal., 179 Pac. (2nd) 5, expert can testify as to failure of auto brakes.

Ruxemer v. Cedar Rapid and I. City Ry. Co., 159 N.W. 1048, expert can testify as to practical devices that could be used as signals at crossings.

Kelsea v. Town of Stratford, N.H., 118 Atl. 9, expert can testify what caused auto to tip over in certain position.

In the case of **Brigham Young University v. Lillywhite**, 118 Fed (2nd) 836, a university was sued for not properly supervising a chemistry experiment that resulted in injuries. Expert testimony as to what was done at other universities was admitted and approved (Certiorari denied, 86. L.Ed., 1941)

And so in almost every case where the nature of the facts are such that the jury could not fairly be expected to draw accurate conclusions for themselves, expert testimony has been allowed to show usage, custom and different methods of doing work. Frankly, we cannot think of a more proper case for the use of expert testimony than the case at bar. Towing is a subject that the average juror would know nothing about and would not be able to form an opinion as to whether the job was being done negligently or not. We suggest to the Court that it read the description of the towing job as described by the defendant in his testimony (Transcript of Record, pages 299-302) and the Court will realize the technical nature of this business and the many problems involved; that the same is a proper subject for expert testimony.

The defendant has raised the objection that this type of question invades the province of the jury and is testimony as to the ultimate fact. However, appellants did not ask or attempt to ask, whether the defendant's way was the proper way, or to have the witness state any conclusions or opinions as to negligence. Appellant only wanted to bring out the custom in the locality and whether or not other methods were practical and to refute the defendant's statement that there was no other practical way to do the job. Then the ultimate question of whether the defendant's way was safe and practical under the circumstances, would be up to

the jury. Without the offered testimony the jury would have to speculate as to whether there was any other way to do the job. The offered testimony would have thrown light on this subject and given the jury a basis on which they could determine the issue of the defendant's negligence. Appellants submit that it was error to refuse such testimony.

4. The Court erred in refusing offered testimony as to custom and usage in putting out flags, or other warning devices.

The testimony of the defendant was that he did not put out any flags, or other warning devices, although his wrecker was parked across the traveled portion of a high-speed cross-country highway only .4 of a mile from the crest of a blind hill. (Transcript of Record, pages 73-78). In this connection the defendant testified that he had with him flares, reflectors, signs, fuses and flashes, but that he did not use them.

The appellants called William Bellinger, and qualified him as an expert towman in the vicinity. (Transcript of Record, page 352) Then appellants asked questions of Mr. Bellinger to show:

- a. That there was a custom existing in the area as to the use of warning devices. (Transcript of Record, pages 352-353)
- b. That it was the custom under certain conditions to put out warning devices. (Transcript of Record, pages 357-358)

As more specifically stated in the Specification of Errors, these questions were objected to and the objections were sustained by the Court; appellants made an offer of proof to show that a custom existed and that the custom was that when it is necessary for a wrecker to block the road, warn-

ings such as flares or signs are put out on each side of the wrecker, that where there is a hill within half a mile, warnings are placed on the crest of the hill, that when the road is slippery, or icy, the warning signs are put out at a greater distance from the wrecker. This offer of proof was objected to and sustained by the Court. (Transcript of Record, pages 357-358)

The principles of law involved in this issue are exactly the same as are involved in the preceding issue on the question of towage. Appellant hereby refers to the cases and authorities quoted on that issue, as to the right of appellant to offer expert testimony on the question of custom and usage.

The rule is summarized in 32 **C.J.S.**, page 139 as follows: "The existence of a custom or usage in any particular trade, art, or calling may be testified to as a fact by a witness who, by his possession of adequate knowledge of the matter, is qualified to testify."

See also **Taylor v. Jackson**, Tex., 180 S.W. 1142, where it is held that a witness who stated he knew of the custom in the vicinity is qualified to testify thereto.

Pa. R. Co. v. Sate of Md., 53 Atl. (2nd) 562, allowed testimony as to custom of having flagmen at railroad crossing.

Burke v. Marshall Inc., Cal., 108 Pac. (2nd) 738, allowed testimony as to custom that trucks blew horns while approaching workmen on dock.

In **Foster v. Buckner**, 203 Fed. (2nd) 527, plaintiff was a painter on a building and working for a painter subcontractor; a boom operated by another sub-contractor struck the plaintiff held that evidence was admissible of custom that operator of boom around such a building should have a lookout man to guide the boom, since the operator of the boom cannot see in all directions. The Court said, "The

failure of the defendant to follow usual practice is evidence of negligence and admissible.'

We quote again from 137 **A.L.R.**, page 611:

"The evidentiary value of the proof of general usage is frequently very clear where the negligence complained of is the failure to use a safety device or other precaution against accident. In such cases the general usage may serve to illustrate what safeguards were feasible and presumably known to the defendant."

The Court should note from the above authorities that this type of testimony does not invade the province of the jury. That there is a custom and what that custom is, is a fact to be considered by the jury as bearing on the negligence of the defendant. In other words the evidence of custom is a fact to be allowed and considered just as any other fact in the case, and appellants submit that as a matter of law there is no controversy on this point.

"The common usage of a business or occupation is frequently stated to be a test of care or negligence and, accordingly, conformity to custom or usage is very generally regarded as a matter proper for consideration in determining whether or not sufficient care has been exercised in a particular case." 65 **C.J.S.**, page 404

And again on 407:

"The omission of usual and customary precautions may be a matter proper for consideration in determining whether or not conduct was negligent for, while ordinary prudence may require more precautions than is customary under similar circumstances, or in a similar business or occupation, it can hardly require less, and hence a lack of such precaution may fairly be regarded as negligence."

The record shows that the witness was properly qualified, and that he knew of the custom and what the custom was. The appellants were entitled to have this evidence before the jury for its consideration. It was error to refuse this testimony.

5. The Court erred in refusing to strike the unresponsive statement of the defendant that his wrecker was an emergency vehicle, and the Court also erred in refusing to give appellants' offered instruction G.

The defendant on cross examination volunteered the statement that his wrecker was an emergency vehicle. (Transcript of Record, page 78). At the time of the statement and also at the conclusion of the testimony, appellants moved that this statement be stricken as the conclusion of the witness. (Transcript of Record, page 78 and 306) The Court refused to strike this statement.

As a matter of law, a wrecker is not an emergency vehicle. Appellants have searched diligently to find anywhere in the body of law where a wrecker, or tow truck is classified as an emergency vehicle. On the contrary, the statutes of the State of Nevada specifically name the types of vehicles which are emergency vehicles and such statutes do not include tow trucks or wreckers. **Nevada Compiled Laws**, Section 4350.1, (1943-1949 Supplement) In fact, appellants do not believe that defendant's counsel have ever contended that a wrecker is an emergency vehicle. Therefore, as a matter of law, the statement is erroneous and should be stricken. In addition the statement was unresponsive and the conclusion of the witness and should be stricken for that reason.

See **C.J.**, Volume 64, page 208 to the effect that it is sufficient ground for motion to strike if the answer to a question is irresponsive, or involves the conclusion of the witness.

It is stated therein, "It has been held error to deny a motion to strike out an answer to a proper question, when such answer is irresponsive—or involves the conclusion of the witness."

Not only did the Court refuse to strike the statement, but it refused to give an instruction to clear up the matter. Appellants requested the Court to give offered Instruction "G", "You are instructed that a wrecker truck or tow truck is not an emergency vehicle". The Court refused to do so. This left the defendants erroneous and highly prejudicial statement undisputed. The jury, as ordinary people, would naturally think of an emergency vehicle as having some special privilege and having the right-of-way and not being subject to the ordinary rules of traffic. The very suggestion of emergency vehicles creates in all of us an almost inherent impression of special privilege and "pulling to the right to let the fire engine go by". This impression would not normally be dispelled without some direct instruction on the matter. The statement of defendant would tend to create in the minds of the jurors the misleading impression that the defendant's wrecker had some special status as a vehicle, that, like a fire engine, or police car, it could go through a red light, or park in the middle of the road. This impression could not be dispelled by merely giving general instructions of negligence. The statement standing as it did would tend to prejudice the jury against the appellants and in favor of the defendant. The failure to strike this statement and instruct the jury regarding it was prejudicial error.

6. The Court erred in giving instruction No. 12 and refusing to give Appellants offered Instruction J.

The full text of this instruction and appellants' objections thereto are found in the Specification of Errors, and also at pages 321 and 307 of the Transcript of Record. This instruction deals with the duty of a person to see ob-

jects that are clearly visible. In connection with this error, appellants will also discuss the Court's error in refusing offered instruction J, (Transcript of Record, page 347) which deals with the same subject.

The instruction as given by the Court places emphasis on an object being clearly visible and, while this instruction may be a proper instruction in an ordinary case not involving any special problems of visibility, it is not proper in the case at bar where the conditions as to visibility are unusual. Therefore this instruction is misleading and should not be given at all unless some additional instruction is given as to the meaning of clear visibility. In offered Instruction J, appellants proposed to add to the instructions given by the Court the following. "Whether an object is clearly or plainly visible is a question of fact to be determined from all the surrounding circumstances". Thus the jury would know that it was their job to determine the question of clear visibility and that they were entitled to consider all the factors regarding visibility in determining whether or not an object was plainly, or clearly, visible. The instruction as given by the Court leaves an impression on the jury that the object has already been determined to be clearly visible and all the jury has to do is decide the question of negligence.

The record shows that there were many factors to be considered in determining the question of whether or not the wrecker was clearly visible to Duff as he came over the crest of the hill. First, he was suddenly confronted with an icy road, he saw a large truck coming up the hill which he had to pass; his sight was naturally attracted by the more brilliant color of the orange U-haul trailer that was off the road. (Transcript of Record, pages 243-244). On being confronted with these things, his attention was naturally absorbed in trying to keep control of his car on the icy road and especially since there were high embankments on both

sides of the road and he did not want to get too close to the edge and he had to watch the sides of the road carefully. He was also absorbed in passing the large truck on the icy road and was trying to keep an eye on the truck. On top of all this he was concerned about the orange U-haul trailer that was off the road and trying to stop in order to help the people there. In other words, as he came over the hill, there were many things to distract and absorb his attention. Then, in addition, the wrecker itself was not easy to see because it was blended into the background. The top of the wrecker was light blue and blended into the cloudy and hazy sky. (Transcript of Record, pages 97-98 and page 270) Then, Duff was traveling on main U. S. Highway; he had no warning and no reason to believe the road would be blocked and he was not required to assume that there would be obstructions on a highspeed highway such as this one. All of these factors should have been taken into consideration in framing an instruction on clear visibility so that the jury would be clearly and plainly informed of its right and duty to take these things into consideration. What was clearly or plainly visible was never defined to the jury and they had no method to determine what things should be taken into consideration in determining clear visibility.

In the case of **Miller v. Advance Transport Co.**, 126 Fed. (2nd) 442, the plaintiff collided with a truck parked at night on the plaintiff's lane of travel. The truck had lights, but no flares, or other warning. Plaintiff recovered and defendant appealed. The Court said that even assuming the truck had lights:

"It must not be over looked that a highway is a place for travel and not for parking. This is not a situation of unavoidable stoppage, as is sometimes referred to by the courts. —Irrespective of the reason for stopping, how-

ever, there was the duty to give proper and adequate warning to other motorists who might be using the highway. For failure in this respect, the negligence was inexcusable."

The defendant in the above case said the plaintiff was guilty of contributory negligence as a matter of law for not seeing that which was in plain sight. The Court said at page 447, par. 12, 13:

"It is not contended that plaintiffs were driving at an excessive rate of speed. As they approached the point of collision they were confronted with what we think may be termed an extraordinary situation. Flares and torches were burning on the opposite side of the road where four large trucks were stopped. Their attention must have been diverted to some extent. They had a right to assume that the lane on which they were traveling was free of obstruction or, if not, that the one responsible for its blocking would give adequate and proper warning thereof. . . . It is well to keep in mind that it is easy for a person, skilled or otherwise, to dissertate on what could or should have been done to avoid an accident. Circumstances and conditions, difficult and confusing, when faced, appear simple in retrospect. Hind-sight may give a more accurate appraisal than foresight, but the existence or want of ordinary care must be determined from the latter rather than the former point of view."

In **Gregory v. Suhr**, 10., 277 N.W. 721, the Court refused an instruction that the plaintiff, who ran into a parked truck, was required to keep vigilant or reasonable lookout upon the basis that the plaintiff had the right to assume the highway was free until notified to the contrary.

In **Morrison v. Perry**, 140 Pac. (2nd) 772, the Court held it was error to instruct, in the case of a motorist collidnig

with a motor vehicle, that plaintiff must not drive at a speed faster than that which he could stop within the range of his vision and also it was error to instruct the jury that the plaintiff was required to keep a constant lookout. The Court pointed out that the motorist had the right to assume, until warned of the contrary, that the highway was free and unobstructed. To the same effect are the following cases:

Winder & Son v. Blaine, Ind. 29 N.E. (2nd) 987 at 989.

Spiker v. City of Ottumwa, Io., 186 N.W. 465, at page 467, wherein the Court said, "There is no rule by which failure to look out for or discover danger when there is no reason to apprehend any can rightfully be held contributory negligence as a matter of law."

Flowers v. S. C. State Highway Dept., S.C., 34 S.E. (2nd) 769 at 771.

The import of the instruction No. 12 as given by the Court is that, when a person looks and does not see what is in "plain sight", he is negligent and inattentive. This is not the law, as can be seen from the above cases. Where there is an extra-ordinary situation, where there are distractions, a person may very well look and be attentive and yet miss what is in "plain sight". A motorist has the right to assume that the road is clear and he does not have to keep constant lookout for obstructions even though they may be in "plain sight". On the contrary, it is the duty of the one obstructing the road to give adequate and sufficient warning. For these reasons it is felt that instruction No. 12 is improper and should not have been given, and it was error to give such instruction.

But if such an instruction was given, it should have been comprehensive enough to clearly and adequately define plain sight and what the jury should consider in connection

therewith. The cases hold that clear visibility must be considered under all the surrounding circumstances.

Martin v. Reihel, Minn., 34 N.W. (2nd) 290

Gaskill v. Melella, Pa., 18 Atl. (2nd) 455

Carter v. LeBlanc Lumber Co., La., 37 So. (2nd) 471

The above cases are to the effect that a failure to see can be explained by distractions and blending terrain.

Kimmel v. Mitchell, Io., 249 N.W. 151 at page 153, failure to see explained by plaintiffs attention distracted by lights from the defendant's parked truck shining into barrow pit.

Flowers v. S. C. State Highway Dept., S. C. 34 S. E. (2nd) 769 at 771, the color of the truck blended with the street and explained failure to see.

Lipford v. Gen. Road and Drainage Co., S.C. 110 S.E. 405, Defendant's truck blended with road, explained failure to see.

Miller v. Advance Transport Co., 126 Fed. (2nd) 442, at page 447, failure to see explained by distraction on the road.

Thus it can be seen that the appellants were at least entitled to have added to the instructions as given by the Court the words, "Whether an object is clearly or plainly visible is a question of fact to be determined by the jury from all of the surrounding circumstances." It was error for the Court to refuse to add these words to the instruction as given.

7. The Court erred in refusing to give appellants' offered Instruction A. (Transcript of Record, page 343).

This instruction deals with the right of plaintiffs to join their action, but the jury is to determine the rights of each of the plaintiffs separately. There is no controversy that

this is a correct statement of the law. The only question is whether it was necessary to give the instruction in the case at bar. Appellants feel that it was necessary to plainly instruct the jury as to their separate rights. There were three plaintiffs in the action; they were all riding in the same car; one of the appellants Jennie R. Duff, was the wife of the driver, John R. Duff. It is natural and easy for the jury under these circumstances to consider the plaintiffs as a group instead of separate individuals with separate rights. An instruction was needed to point out to the jury that they must consider the case of each plaintiff as a separate matter. This type of instruction finds support in **California Approved Jury Instructions**, Section 52. It is an instruction that is used frequently and has been declared by the courts to be necessary and proper.

McCallum v. Howe, Cal., 243 Pac. (2nd) 894

Fresno City Lines, Inc., v. Herman, Cal., 217 Pac. (2nd) 987

In this connection see 88 **C.J.S.**, page 813, to the effect that where a jury may find in favor of some of the parties and against others, they should be so instructed.

New England Nat. Bank of Kansas City v. Hubbell, Idaho, 238 Pac. 308.

The nature of this case was complex, there were many instructions on the various rights, duties, defenses and so forth of the plaintiffs and similar instructions in reference to the counterclaim of the defendant. Under such circumstances, it is easy for the jury to become confused and even though the rights of the various parties were touched on in some of the other instructions, a clear, separate and distinct instruction was needed to specifically point out the separate rights of the appellants. No such instruction was given and therefore it was error to refuse to give plaintiff's offered instruction A.

8. The Court erred in refusing to give appellants' offered Instruction 1.

The full substance of this instruction is set out in the Specification of Errors at page 346 of the Transcript of Record. The substance of this instruction is that under Section 4365, **Nevada Compiled Laws**, it is unlawful for a person to stop or park on the main traveled portion of the highway unless he can affirmatively prove that it was necessary for him to do so; that a person found to be parked, or stopped, on the main traveled portion of the highway is prima facie negligent and has the burden of proving that it was necessary for him to be there. The text of said Section 4365 is as follows:

"No person shall stop an automobile, nor permit it to remain standing, on the main traveled portion of any highway for a length of time greater than is reasonably required to make adjustments or repairs; provided, that where there is room to make adjustments or repairs the motor vehicle shall be driven entirely off the main traveled portion of the highway."

It is a well settled law that the violation of a statute of this nature is negligence.

"The generally accepted view is that violation of a statutory duty constitutes negligence as matter of law, or according to the decisions on the question negligence per se, for the reason that non-observance of what the legislature has prescribed as a suitable precaution is failure to observe that care which an ordinarily prudent man would observe." 65 **C.J.S.**, page 418.

"The rule supported by the great weight of authority is that a violation of traffic regulations of a state or municipality, so far as they embody express commandments governing the use of vehicles, is negligence per se . . ."

Blashfield Ency. of Auto Law and Practice, Vol. 4, Sec. 2681.

And in Section 2691 (under Violations of Statutes)

"The general rule is that the act of stopping or parking, or leaving a motor vehicle in the highway constitutes negligence per se."

And in 38 **Am. Jur.**, page 827, that it is the great weight of authority that the violation of a statute is negligence per se. It should be noted that these authorities stating the general rule are talking about negligence per se, which imposes a much greater burden on the defendant than the instruction offered by the appellants which speaks in terms of prima facie evidence. And, while most of the cases go so far as to hold negligence per se in these cases, at the very least all of the cases hold it is prima facie negligence to violate a statute. See **Blashfield Ency. of Auto Law and Practice**, Volume 4, Section 2701. Appellants know of no substantial authority which holds that the violation of a statute is not at least prima facie negligence and that the **jury had a right to consider the statute in connection with the other evidence of the case.** The Court in the case at bar, by refusing to give this instruction, made it impossible for the jury to consider this statute in connection with the negligence of the defendant in parking his wrecker on the highway and such was prejudicial error. In other words, one of the most important items of evidence as to the defendant's negligence, i. e., his violation of a statute, was not mentioned to the jury. Appellants were clearly entitled to an instruction on this subject.

"Where the issue is raised by the pleadings and evidence, the Court should properly instruct the jury as to the rights and duties of the parties involved in a collision between a vehicle and another vehicle parked or left standing in the highway, **including the duties imposed**

by statute." **Blashfield Ency. of Auto. Law and Practice**, Volume 10, Section 6713.

Gaches v. Daw, (Wash. 1932), 10 Pac. (2nd) 1111.

"An instruction based on a statute respecting stopping on highways was properly given and was to the effect that "if appellants stopped their car on the paved portion of the highway, when it was practical to leave the vehicle standing off the highway, then they were guilty of negligence as a matter of law."

Huston v. Robinson, (Neb. 1944) 13 N.W. (2nd) 885 is a case involving a statute very similar to the Nevada Statute. The Court said at page 888, "Where the evidence shows that a vehicle was left standing on the paved, improved, or main traveled portion of a highway, a prima facie violation of the statute is established and it is incumbent upon the person charged to show the existence of facts which take him out of the scope of the act. In the instant case, therefore, the evidence that the defendant's car was standing on the pavement is evidence of a violation of statute relative to the use of motor vehicles on our highways which if found to be true is evidence of negligence which the jury may consider."

It is also clear that the appellants having proved a prima facie violation of the statute, the defendant must affirmatively show an excuse for such violation.

In 131 **A.L.R.**, at page 603, it states:

"It has been held that the burden of proving the necessity or excuse of stopping on the main traveled portion of the highway, within the meaning of the statutes generally regulating stops on the highway is upon the person making the stop."

Silvey v. Harm, (Cal. 1932) 8 Pac. (2nd) 570, was a negligence action similar to the one at bar. The Court said,

"The violation of a statute prohibiting the parking or leaving of a car on the traveled portion of the highway when it is practical to remove the car will constitute negligence per se, which shifts the burden of proof to the party so charged to show that it was not practical within the meaning of the statute for him to move the car off the paved or main traveled portion of the highway."

Casey v. Gritsch, (Cal. 1934) 36 Pac. (2nd) 696, "It is not the duty of a party injured in a collision under such circumstances to show that parking was not necessary, but it is the duty of the other party to bring himself within the exception prescribed by statute."

In other words, the authorities are almost unanimous that the jury has the right to consider the statute as evidence of negligence, and where the injured party has proved a prima facie violation of the statute, then the defendant must affirmatively prove the impracticability of moving his vehicle off the highway. In the case at bar, the agreed facts state there was a 7½ foot shoulder on the north side of the road (Transcript of Record, page 24) and the defendant admitted that his wrecker was parked on the main traveled portion of the highway. This is a prima facie violation of the statute, and it was then the affirmative duty of the defendant to bring himself within any exception to the statute, and the jury should have been so instructed. It was for the jury to determine the negligence of the defendant in the light of this statute and the obligations imposed thereby. The appellants were prejudiced by the refusal of the Court to give this instruction. In connection with this, the appellants again draw the attention of the Court to the tremendous importance of the testimony of William Bellinger which was offered and refused by the Court and is discussed herein under subsection 3. His offered testimony was as to practical methods of doing the towing job without getting on the main traveled portion

of the highway. These were all things which greatly bear upon the negligence of the defendant and they are things which the jury had a right to consider and the refusal of the trial Court to allow these matters was gross prejudice to the appellants herein on the issue of negligence, and the Court erred in rejecting this matter.

9. It was error for the trial Court to refuse to grant appellants' motion for a new trial.

Appellants will not further brief this point, except to refer the Court to the errors heretofore specified and briefed. Because of these errors the trial Court should have granted the appellants a new trial as the same were proper grounds for a new trial, to-wit:

- a. Errors at law occurring at the trial and excepted to by appellants.
- b. Orders of the Court by which appellants were prevented from having a fair trial.

In addition to the above, the trial Court should also have granted a new trial on the grounds that there was insufficient evidence to justify the verdicts against the appellants and that the verdicts were against the law and the evidence. The weight of the evidence in this case was clear. It is difficult to imagine anything more negligent than to park a vehicle across an icy, high speed, cross-country highway .4 of a mile from the crest of a blind hill without putting out any kind of flags or warnings and with only the self-serving statement of the defendant to justify the necessity of his being there. On the other hand, there is no evidence in the record that the appellants were negligent. The whole weight of the evidence sustains the appellants and to permit otherwise was a miscarriage of justice. The law in reference to New Trials is that it is the duty of the judge to weigh the evidence and prevent a miscarriage of justice.

Aetna Casualty & Surety Co. v Yeatts, (C.C.A., Va., 1941) 122 Fed. (2nd) 250

Kaufman v. Atlantic Greyhound Corp., (D.C., W. Va., 1941) 41 F. Supp. 252

General Acc. Fire and Life Assur. Corp., (D.C., Cal., 1945) 61 F. Supp. 153

Grayson v. Deal, (D.C., Ala., 1949) 85 Fed. Supp. 431

Daffinrud v. U.S., (C.C.A., Wis. 1944) 145 Fed. (2nd) 724.

All of the above cases not only state that it is the duty of the trial Court to weigh the evidence and prevent a miscarriage of justice, but that he should do so even where there is some evidence to support the verdict and even though there may be substantial evidence which would prevent the direction of a verdict. The cases also hold that the Judge cannot be arbitrary about granting a new trial, but that it is his duty to grant the same when he concludes there has been a miscarriage of justice, or that the weight of the evidence was against the verdict.

"In passing on motions for new trial, trial judge is not bound by conflicts in the evidence but in effect sits as a thirteenth juror with duty of reviewing the evidence and passing on its sufficiency and, if he concludes that the verdict has resulted in a miscarriage of justice, it is his duty to grant a new trial." **Gen. Acc. Fire and Life Assur. Corp.**, (D.C., Cal., 1945) 61 Fed. Supp. 153.

"Where there is legal ground that requires the Court in the interest of justice to grant a new trial, there is no basis for the court to act arbitrarily by denying a new trial." **U.S. v 3969.59 Acres of Land**, (D.C. Idaho, 1944) 56 Fed. Supp. 831.

In order to prevent a miscarriage of justice in the case at bar, the trial Court should have granted a new trial to the appellants and his refusing to do so was error.

V

CONCLUSIONS AND SUMMARY

We submit that the errors of the trial Court as specified herein were prejudicial to the appellants and prevented them from having a fair and proper trial. Without again specifying each of the errors committed by the trial Court, we can summarize the matter for the Court. In looking at the whole case and the whole evidence, it is manifestly apparent that the issue of the defendant's negligence was not properly put before the jury. Here was a defendant parking his truck on the main traveled portion of a high-speed highway in prima facie violation of state statute, the road is slick, and there is a blind hill .4 of a mile to the east, yet this man put out no signals, no flares, nor signs or warnings of any kind. The only evidence in the record to justify this type of dangerous (see defendant's own statement that this was a dangerous position, Transcript of Record, page 79) conduct was the defendant's own self serving statement that there was no other practical way to do the towing job, and he didn't think it was necessary to put out warnings (Transcript of Record, pages 92, 93). Yet the trial Court refused to allow the appellants to put in competent and expert testimony concerning the customs and usages as to putting out warnings and methods of towing and the practicability of doing the tow job without getting on the main traveled portion of the highway; the Court refused to instruct the jury as to the uncontroverted law that one who violates a statute, or ordinance, is at least prima facie guilty of negligence and in fact did not even mention the fact to the jury that there was such a statute in the State of Nevada prohibiting people from stopping on highways unless they can affirmatively show

good reason therefore; and then the Court allowed the matter to go to the jury under the misleading impression that a tow truck was an emergency vehicle, when, as a matter of law, it is not. The Court refused to qualify the jury as to their possible interest in the insurance company which was interested in the defendant's insurance.

We submit that nothing could be more unfair and prejudicial than the above errors committed by the trial Court, which in practical effect almost directed a verdict of not guilty on the issue of the defendant's negligence.

And then the trial Court failed to clearly instruct the jury as to separate rights of each of the plaintiffs. Whatever may be said of the negligence of the driver, John A. Duff, there is no evidence in the record of negligent conduct on the part of the appellants which was the proximate cause of the accident. The appellants were entitled to a simple and direct instruction that their rights should be considered separately. This the Trial Court refused to do.

For these reasons, as well as for the other reasons that have been specified herein, the appellants submit that the trial Court was in error and the appellants were prejudiced thereby and the case should be reversed and remanded to the Trial Court with proper instructions.

Respectfully submitted,

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By /s/ GEORGE F. WRIGHT

Attorneys For Appellants



~~ORIGINAL~~

No. 15186

In The

United States Court of Appeals

For the Ninth Circuit

JENNIE R. DUFF AND ELIZABETH BRONSON,
Appellants,

VS.

H. L. PAGE,
Appellee.

BRIEF OF APPELLEE

**Appeal from the United States District
Court for the District of Nevada**

PIKE & McLAUGHLIN,
15 East First Street
Reno, Nevada
Attorneys for Appellee.

~~FILED~~

JUN 7 1957

PAUL P. O'BRIEN, CLERK

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JENNIE R. DUFF AND ELIZABETH BRONSON,
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VS.

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Appellee.

ANSWERING BRIEF OF APPELLEE

I.

STATEMENT OF THE CASE

Appellee accepts Appellants statement of the facts of the case as being substantially correct so far as they go, and in accordance with the District Court's statement of the agreed facts, as modified somewhat by the evidence at the trial.

The defendant contends that he was rightfully parked on the highway in the process of assisting another car with a trailer back onto the highway, and that the plaintiffs had a clear, unobstructed view as they approached the wrecker for approximately .4 of a mile; that a red blinker light was operating on top of the wrecker. Defendant contends that the evidence clearly shows that plaintiff John A. Duff

was driving at an excessive rate of speed, failed to keep a proper lookout and failed to keep his car under proper control, and that such negligence on the part of said plaintiff was the sole, direct and proximate cause of the accident and of any injuries sustained by any of the plaintiffs.

II.

APPELLEE'S ANSWERS TO APPELLANTS' SPECIFICATION OF ERRORS

Appellee numbers the points in this brief in the same manner as they have been numbered in that portion of Appellants Opening Brief entitled Specification of Errors, commencing near the bottom of page 6 of such brief.

THE COURT DID NOT ERR AS CLAIMED BY PLAINTIFFS:

1. THE QUESTION AS TO WHETHER OR NOT THE JURORS OWNED ANY STOCKS OR BONDS IN THE AMERICAN CASUALTY COMPANY WAS IMPROPER.

The purpose of the examination of a juror is to ascertain his qualifications as a juror and whether or not there is any bias or prejudice on his part which would prevent the parties from having a fair trial. The examination is not intended as an opportunity for either of the parties to bring out that the other party may or may not be covered by liability insurance. The fact that one of the jurors may be interested in or connected with any insurance or casualty company that may be interested in the case as an insurer of the defendant's liability is material, and where there is

any reason to believe that this is the case, it should be gone into on the voir dire examination. However, the examination must be conducted in good faith and should not go beyond that point which is reasonably necessary to elicit the desired information. In a Utah decision, *Balle v. Smith*, 17 P. (2) 227, it was held:

“The object of an examination of a juror on his voir dire is to ascertain whether he has the statutory qualifications of a juror, and having the statutory qualifications, whether there are grounds for a challenge for either actual or implied bias and to enable the party to exercise intelligently his peremptory challenges. *State v. Morgan*, 23 Utah 212, 64 P. 356; *Tavilonis v. Valentine*, 120 Ohio St. 154, 165 N. E. 730. We hold, therefore, following the great weight of authority and the better reasoning, that counsel for plaintiff is entitled to learn whether any juror is interested in or connected with any insurance or casualty company that may be interested in the case as an insurer or defendant’s liability. Clearly one interested in such an insurance company as stockholder or employee would be subject to challenge. *The examination must be in good faith and precaution taken to ask the questions in such manner as will not convey the impression that the defendant is in fact insured. It would be misconduct on the part of counsel for plaintiff in such actions to so frame his questions that they go beyond what is reasonably necessary to serve the legitimate purpose of eliciting the fact that he is entitled to adduce in order to secure a jury free from bias and prejudice. Daniel v. Asbil*, 97 Cal. App. 731, 276 P. 149.”

Following the spirit of this decision, a later Utah decision, *Saltas v. Affleck*, 105 P. (2) 176, (1940) held that it was error for counsel to ask each juror if he were an officer or a stockholder of the particular insurance company in which the defendant’s insurance was carried.

Other cases holding that the examination of the jurors in this regard must be conducted in good faith are:

Wheeler v. Rudeck, 397 Ill. 438, 74 N. E. (2) 601, (1947);

Ewing-Von Allmen Dairy Co. v. Godwin, 200 S. W. (2d) 103, (Ky. 1947).

A good case illustrating the manner in which this examination should be undertaken, if at all, is the case of *Safe-way Cab Service Company v. Miner*, 180 Okla. 448, 70 P. (2) 76. There it was said that the proper procedure is for counsel to ask a juror if he owns stock in any corporation or is employed by one. If he answers in the negative, further questions are unnecessary. If, however, he answers in the affirmative, inquiry as to the type of corporation is proper. If the answer discloses that it is a corporation other than the one engaged in the insurance business, further questions are unnecessary. If the answer discloses that it was an insurance company, then pertinent and specific questions are proper in order to establish the prospective juror's partiality.

In this case, the jurors had each been asked for their occupations, and it appeared that none of them worked for an insurance company. The specific question as to whether or not they owned and stocks or bonds in the American Casualty Company could have been designed to have only one purpose, that is, to put before the jury the fact that the defendant carried insurance in that company. For that reason it was properly refused.

2. IT WAS NOT ERROR TO RESTRICT PLAINTIFFS FROM RE-EXAMINING THE WITNESS,

EARL REMINGTON, CONCERNING HIS STATEMENT THAT DUFF WAS DRIVING TOO FAST.

It is true that when one party is permitted to bring out or have a witness testify concerning matters which have not been covered on direct examination, the other party should be entitled to go into these matters upon re-direct examination. However, that is not the point here. The question on cross-examination of this witness went to the same general subject matter as had been covered in the direct examination, and was intended merely to show the credibility of the witness' direct examination. Plaintiffs' attempt to go into this statement on re-direct was merely an attempt either to re-establish his witness or to get inadmissible evidence before the court.

If it were intended to re-establish the witness, the question was improper by reason of the fact that it was not directed toward the pertinent point, that is, whether or not the witness had made such a statement.

“The credibility of a witness impaired by an accusation that he has made statements at variance with his testimony on the witness stand may be re-established by evidence in reply that he never made the inconsistent statements attributed to him.” *58 Am. Jur., Sec. 809, page 452.*

If the question were intended to get other evidence before the court, it was incorrect because prior statements inconsistent with statements made on the witness stand are not intended to and cannot be accorded any value as substantive evidence.

“But the rule generally followed is that such previous inconsistent statements of the witness cannot be

accorded any value as substantive evidence. Not having been made in the presence or hearing of the party, nor under the circumstances as to bind him, they are merely hearsay. Their only office and use is to impeach the witness and to negative or neutralize his testimony. In short, the impeaching and contradictory statements are admitted only to destroy the credit of the witness, to annul and not to substitute his testimony." 58 *Am. Jur.*, *Sec. 804*, page 449.

The questions asked were further objectionable upon the ground that they were repetitious, that is, they covered the same material which had been covered upon direct and cross-examination, and for that reason were not the proper subject of re-direct examination. Further, the questions were leading and suggestive.

3. THE COURT DID NOT ERR IN REFUSING TO ALLOW PLAINTIFFS TO SHOW THAT IT WAS PRACTICABLE TO TOW THE TRAILER IN SOME OTHER MANNER.

One of the ultimate questions in this case is whether or not the defendant was negligent in the manner in which he attempted to pull the trailer back up onto the highway. The fact that he might have done it in some other manner is immaterial, the question being whether or not the manner in which he was doing it was negligent.

Expert testimony is available to show different methods of doing work, mechanical or otherwise, where the subject is beyond the knowledge, understanding and ordinary comprehension of the average juror. To illustrate, the manner in which a surgical operation should be performed would be a matter of expert testimony. On the other hand, the

manner of driving an ordinary automobile is a matter of common knowledge and understanding and would not require the testimony of an expert.

As is stated in *20 Am. Jur., Sec. 780, page 650*:

“Though permitting opinions of expert witnesses to be given in evidence is chiefly applicable to cases in which, from their very nature, the facts disconnected from such opinions cannot be clearly presented to the jury so as to enable them to pass thereon with the requisite knowledge and informed judgment, the governing rule deducible from the adjudicated cases seems to be that the subject must be one of science or skill, or one of which observation and experience has given the opportunity and means of knowledge which exist in reason rather than descriptive facts, and, hence cannot be intelligently communicated to others not familiar with the subject so as to possess themselves of a full understanding of it. Expert testimony is admissible only where, by reason of peculiar skill and experience, inferences can be drawn from facts, which an ordinary untrained mind cannot deduce or where such testimony relates to a subject which is not within the average experience and common sense of the jury. Expert opinion testimony is never admissible where the subject is one of common knowledge as to which facts can be intelligently described to the jury and understood by them, and they can form a reasonable opinion for themselves. Furthermore, the facts on which an expert opinion is based must permit of reasonably certain deductions as distinguished from mere conjectures.”

In *DeMarais v. Johnson*, (Mont.) 3 P. (2) 283, cited in plaintiffs' brief, it was held that a garageman of thirteen years experience could testify that loose spokes caused the collapse of a truck wheel on the ground:

“The opinion of garageman was competent, since it

dealt with a question concerning which the mass of mankind could not reach as intelligent a conclusion as could one who had had experience with the effect of loose spokes in a wheel."

However, in citing that case, the court quoted other Montana cases with approval as follows:

"The necessity for opinion evidence only exists where the facts in controversy are incapable of being detailed and described so as to give the jury an intelligible understanding concerning them; but when the facts are such as can be detailed or described, and the jury are able to understand and draw a correct conclusion from them without such opinion evidence, the necessity for it does not exist."

The operation of pulling the trailer back onto the highway was not such an involved or technical operation as to be incapable of being described so as to give the jury an intelligible understanding of the operation. Moreover, the testimony was objectionable upon the grounds that it would have been an invasion of the province of the jury, that is, it would have called for an opinion on one of the ultimate facts to be decided by the jury.

"One of the objections most frequently raised against the admission of expert opinion testimony is that the opinion offered invades the province of the jury. This objection is indeed the basis of the general rule of evidence that the testimony of witnesses must be confined to concrete facts, perceived by the use of their senses, as distinguished from opinions and conclusions deducible from evidentiary facts. Opinion testimony of experts is only admissible in cases of necessity, where the proper understanding of facts in issue requires some explanation of those facts or some deduction therefrom by persons who have scientific or specialized knowledge or experience. Such testimony

does, in a broad general sense, encroach upon the province of the jury; and when it relates to matters directly in issue, it should not be admitted unless its admission is demanded by the necessities of the individual case." *20 Am. Jur., Sec. 782, page 653.*

The proffered testimony was further objectionable for the reason that no proper foundation was laid. In order to qualify this type of opinion evidence, it must be shown that the opinion is based on conditions, including road conditions, weather conditions, type of equipment, time of day and so on, which are the same as those actually shown to exist at the time of the actual incident. The person giving such an opinion must be shown to have had experience with the same type of equipment and under the same conditions as that to which he is testifying. In the case at bar, there was no such foundation laid and the testimony is, therefore, inadmissible on that ground.

In conclusion then, the proffered testimony was inadmissible for a number of reasons. To prove that an act may have been done differently than it was done is not proof of negligence. In order for expert testimony to be introduced, the opinion of the expert must be shown to rest on conditions and experience similar to those actually in existence at the time of the matter testified to. Assuming, however, that a sufficient foundation was laid, expert testimony is inadmissible when it goes to matters which are within the common experience and knowledge of the jurors and about which they can make a decision without the assistance of an expert especially when the opinion called for is one of the very ultimate issues of fact to be decided

by the jury. The offered testimony was not admissible as custom and usage.

The testimony that it would have been practicable to tip the trailer on its wheels with the tow car on the shoulder and then pull the trailer up the embankment and onto the road, a different manner than was being employed by the defendant in this case, was obviously not intended as testimony going to prove custom and usage. It is evident that the manner in which a trailer might be pulled up an embankment and onto a highway would vary depending upon the particular circumstances in each case, such as the size of the trailer, the weight of the trailer, the height of the embankment, the steepness of the shoulder and the like.

The most obvious example of evidence of this character is evidence that the person charged failed to take or furnish safety precautions which were customarily furnished. For instance in the case cited in plaintiffs' brief, *Burke v. Marshall, Inc.*, (Cal.) 108 P. (2) 738, the safety precaution which was customary was that trucks would blow their horns while approaching workers on a dock.

Testimony that it might have been more practical to have towed the trailer in a different manner does not show any custom or usage, the variation from which would be negligence.

4. PLAINTIFFS WERE NOT PREJUDICED BY THE COURT'S FAILURE TO STRIKE DEFENDANT'S STATEMENT THAT THE TOW TRUCK WAS AN EMERGENCY TRUCK.

The plaintiffs complain of the refusal of the Court to strike the defendant's statement that his tow truck was an

emergency vehicle. In view of the Court's instruction regarding the rights, responsibilities and duties of the parties, it is not seen how this statement could have had any prejudicial effect upon the outcome of the case. To assume that it did is to assume that the jury disregarded all of the instructions of the court and applied their own ideas on the law applicable to emergency vehicles, a result not warranted by the outcome of the case.

5. THE OFFERED TESTIMONY AS TO THE PUTTING OUT OF FLAGS AND OTHER WARNINGS WAS COVERED BY OTHER WITNESSES.

Moreover, failure to admit evidence in this regard would not prejudice the plaintiff if the evidence affirmatively shows that the defendant's vehicle was visible for a great distance and could be as readily seen as any signal or flag would have been seen so that the absence of a signal or flag was not a proximate cause of the accident.

6. THE COURT DID NOT ERR IN GIVING CERTAIN INSTRUCTIONS TO THE JURY.

We are somewhat taken aback by plaintiffs' assertion in discussing Instruction No. 12 that a driver is not obligated to keep a lookout and to see that which is plainly or clearly visible.

As stated in *Blashfield's Cyclopedia of Automobile Law and Practice*, Vol. 1, Part II, page 571:

"A motorist must use his eyes and see seasonably that which is open and apparent.

“In other words, the duty of looking ahead imposes upon the driver, whether of an automobile or of domestic animals, the obligation to see whatever there may be in the line of his vision, for a reasonable distance, which will affect his driving, and, if his view is unobstructed, he will be held in law to have seen persons on the street in front of him, and will be deemed negligent as a matter of law if he fails to see that which should have been obvious.”

The cases cited in plaintiffs' brief holding that one was not necessarily negligent under the circumstances of the particular case to see an object are in many instances not appropro since the question in those cases was whether or not the person was guilty of negligence as a matter of law. The question was, in this case, submitted to the jury to determine the issues in favor of the defendant.

The key words in the instruction are that the person must see that “which is plainly or clearly visible.” There still exists the question of whether or not the defendant's vehicle was plainly or clearly visible, which was to be decided and has been decided by the jury. If they believed under the evidence that the defendant's vehicle was not clearly or plainly visible, then they may have excused the plaintiffs' failure to see the defendant's vehicle. Most of the plaintiffs' argument is addressed to this point, that is, that the defendant's vehicle was not clearly or plainly visible, which has been resolved against them by the jury. The fact that there may have been a difference of opinion as to whether or not the vehicle was plainly or clearly visible did not make the instruction erroneous.

7. PLAINTIFFS' REQUESTED INSTRUCTION No. A SHOULD NOT HAVE BEEN GIVEN.

Plaintiffs complain of the refusal of the Court to give their Instruction No. A in regard to the rights of the plaintiffs to join their actions and that the jury should determine their rights separately. The plaintiffs are correct in their assertion that the rights of the various plaintiffs should be dealt with separately in those instances wherein their rights under the particular circumstances differ. However, a reading of all the instructions given by the Court will show that the Court did not confuse the rights of the plaintiffs, but adequately instructed the jury that in those instances in which the case required they may be dealt with separately.

8. PLAINTIFFS' REQUESTED INSTRUCTION No. G SHOULD NOT HAVE BEEN GIVEN.

Plaintiffs were not prejudiced by the Court's refusal to give Plaintiffs' offered instruction "G" to the effect that a wrecker truck or tow truck is not an emergency vehicle, for the same reason that plaintiffs were not prejudiced by the Court's failure to strike defendant's statement that the tow truck was an emergency truck, as set forth in No. 4, page 10 this brief, in view of the Court's instruction regarding the rights, responsibilities and duties of the parties.

9. PLAINTIFFS' REQUESTED INSTRUCTION No. I SHOULD NOT HAVE BEEN GIVEN.

The Court did not err in refusing to give plaintiffs' requested instruction "I". This instruction was included

within the proposed instructions lettered A to M tendered by the plaintiffs. At page 309, Transcript of Record, the Court said "Let the record show that plaintiffs have offered certain instructions, with request that they be given, these instructions being lettered A to M, for the purpose of the offer. The Court is of the opinion that these offered instructions are included in those approved by the Court and are covered, or that they do not constitute the law applicable to this case and the evidence." We do not find in the Transcript of Record any objection made by plaintiffs to the Court's refusal to give this instruction "I". The record shows only that it was in the mentioned group of lettered instructions tendered by plaintiffs and which were refused by the Court for the stated reasons.

10. PLAINTIFFS' REQUESTED INSTRUCTION No. J SHOULD NOT HAVE BEEN GIVEN.

The Court did not err in refusing to give the plaintiffs' requested Instruction No. J. The plaintiffs claim that the Court should have instructed the jury in connection with Instruction No. 12 to the effect that "whether an object is clearly or plainly visible is a question of fact to be determined from all the surrounding circumstances." This is perhaps a correct abstract statement of the law, but is, we submit, not a proper instruction to be given considering the common sense capabilities of the jury. How else could they have understood the instructions of the Court other than that they should judge the actions of the parties with respect to the surrounding circumstances at the time?

11. The District Court did not err in refusing to grant plaintiffs' Motion for New Trial for any of the reasons contended by plaintiffs, namely, insufficiency of the evidence to justify the verdicts against the plaintiffs; that the verdicts were contrary to the evidence; that the verdicts, against the plaintiffs were against law; that errors in law occurring at the trial and excepted to by the plaintiffs and orders of the Court, as more specifically set forth in appellants' Specification of Errors, by which plaintiffs were prevented from having a fair trial.

(Transcript of Record, pages 42-44).

The Court did have power to grant a new trial had the evidence been insufficient to justify the verdict reached by the jury. The question, however, to be determined in this regard was whether the jury might have reasonably found from the evidence as they did. From the result reached, it appears that the jury found that the actions of the plaintiff, John A. Duff, were the proximate cause of the accident. It is submitted that the evidence in this case is sufficient to justify that result and that they might reasonably have so found.

It is significant that briefs were filed by the plaintiffs in the Trial Court in support of plaintiffs' Motion for New Trial and that their brief filed before this Appellate Court follows in the main such Trial Court brief, and this brief of Appellee follows the answering brief filed by defendant in opposition to plaintiffs' Motion for New Trial in the Trial Court.

It is submitted by Appellee that this Court should affirm the judgment of the Trial Court entered on the jury's verdict in favor of defendant and appellee, H. L. Page.

Respectfully submitted,

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No. 15186

**United States
Court of Appeals
For the Ninth Circuit**

JENNIE R. DUFF and ELIZABETH BRONSON, Appellants,

vs.

H. L. PAGE,

APPELLEE.

Reply Of Appellants

Appeal from the United States District
Court for the District of Nevada

FILED

JUN 27 1957

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REPLY BRIEF OF APPELLANTS

Appellants hereby reply to the brief of the Appellee and shall discuss the various points in the same order and number them in the same manner as they are set forth in the brief of Appellee.

1. IT WAS ERROR FOR THE TRIAL COURT TO REFUSE TO ASK THE JURORS ON VOIR DIRE EXAMINATION IF THEY OWNED STOCKS OR BONDS IN THE AMERICAN CASUALTY COMPANY.

Appellee has admitted in his brief and the authorities which he has cited state, "following the great weight of authority and the better reasoning, counsel for plaintiff is entitled to learn whether any juror is interested in or connected with any insurance or casualty company that may be interested in the case as an insurer of defendant's liability. Clearly one interested in such an insurance company as stockholder or employee would be subject to challenge." (**Daniel v. Asbil, 97 Cal. App. 731, 276 Pac. 149** and quoted in Appellee's brief, page 3)

Apparently, appellee's only contention in this matter is that Appellant's were acting in bad faith and that appellants' only purpose in this question was to put the fact of insurance before the jury. But appellee has not cited any evidence of fact which would even suggest bad faith on the part of appellants. The appellee has suggested that since the jurors had been asked their occupation and none of them worked for an insurance company, it was not necessary to ask them if they owned any stock or bonds. However, it is obvious that a person could own stock or bonds in a company and be interested in that company even though he didn't work for it. Nor has appellee cited a single case or authority to refute the rule cited on page 17 of appellants' opening brief that when an insurance company is in fact interested, good faith will be presumed. Appellee has not cited any cases to question the general law stated at page 14 of appellants' opening brief that such examination is not improper although it incidentally dis-

closes to the juror that an insurance company is, or may be, interested in the result of the action. In other words, appellee's assertion that appellants were acting in bad faith is not supported either in law or in fact. On the contrary, all the rules and presumptions of law support the appellants and all the facts indicate that appellants were acting in good faith for the purpose of determining the qualifications of the jurors. Appellee cited a few scattered cases to the effect that the question should not be asked concerning a particular insurance company. However, that is not the generally accepted law. Appellants again refer the Court to the authorities cited on pages 15 and 16 of their opening brief to the effect that the general rule is that the question may be asked with reference to a designated insurance company, which may be mentioned by name.

Appellants again point out that regardless of what objections the appellee may make to the exact form in which the question was put; as a matter of fact no question on this subject in any form whatsoever was asked of the jurors and the trial Court would not go into this matter at all. Yet it is the incontroverted law, and so admitted by the appellee, that appellants had a right to have the jurors questioned on this subject to determine their qualifications in respect to insurance. It was prejudicial error for the trial Court to refuse to make interrogatories of the jurors on this subject.

2. IT WAS ERROR FOR THE COURT TO REFUSE APPELLANTS THE RIGHT TO RE-EXAMINE THE WITNESS, EARL REMINGTON, CONCERNING HIS STATEMENT THAT DUFF WAS DRIVING TOO FAST.

Once again, appellee has admitted that the law pertaining to this question as set forth in appellants' brief is correct. In other words, a party on re-direct examination does have a right to question the witness and have him explain any inferences or impressions created by the testimony on cross-examination. Appellee takes the position, however, that the questions on re-direct examination were repetitious, that the cross examination was only to show the credibility of the witness' direct examination, and that all plaintiff was trying to do on re-direct examination was re-establish the witness. We submit that a reading of the

testimony of Earl Remington will reveal that the appellee's contentions are without support in the record. Appellee has nowhere referred to the record or pointed out any instance in the testimony where there was repetition or where the credibility of the witness was being attacked on this point.

The direct testimony of Earl Remington is found on pages 152-164 of the Transcript of Record. On direct examination no question was asked and no statement was made as to the speed of the Duff car as it came over the hill or proceeded down the west slope of the hill. No statement of opinion was asked for or given as to whether or not Duff was or was not traveling too fast. The question of Duff's speed was first brought up on cross-examination (Transcript of Record, page 167) when the witness was asked if he had formed any opinion as to how fast the Duff car was going. There, for the first time, the question of speed was discussed and it was at that point that the witness stated that it was his opinion that Duff was traveling too fast for the existing condition. Since this matter was first mentioned on cross-examination, how can the appellee say that this was simply a matter going to the credibility of the witness' direct examination? How can the appellee say that it was repetitious? How can the appellee say that the re-direct examination was merely an attempt to re-establish the credibility of the witness when on this point the credibility of the witness had never been attacked?

The record will show that on cross-examination the witness made a plain and simple statement that in his opinion Duff was driving too fast for the existing condition (Transcript of Record, page 168). Appellee seems to be under the impression that the appellants were trying to get the witness to refute this statement, or that appellants were trying to bring out some inconsistent statement made by the witness at some other time. The authorities cited in appellee's brief are directed toward that thought. But the record will show that this was not appellants' line of questioning. For the first time on cross-examination the witness made a statement about Duff's speed that was not complete and therefore tended to create a misleading im-

pression on the minds of the jury. As pointed out in detail in appellants' opening brief, there were other facts and circumstances which should have been explained so that the jury would have the full explanation of why the witness made that statement. It was not a matter of refuting the statement or trying to claim the statement wasn't made, or to discredit the witness, but it was simply a matter of getting all the relevant facts pertaining to that statement before the jury. In other words, the jury was entitled to a full explanation of all the facts. The appellee agrees that under the law "when one party is permitted to bring out or have a witness testify concerning matters which have not been covered on direct examination the other party should be entitled to go into these matters upon redirect examination." (Appellee's Answering Brief, page 5.)

Therefore, there is no question as to the law and appellants submit that an examination of the record will show that this matter was not mentioned, let alone covered, on direct examination. It would therefore seem that under appellee's own statement of the rule, appellants were entitled to go into the matter on re-direct examination. The failure of the trial court to allow appellants to do this was prejudicial error.

3. IT WAS ERROR FOR THE TRIAL COURT TO REFUSE APPELLANTS THE RIGHT TO SHOW THAT IT WAS PRACTICABLE TO DO THE TOWING JOB IN SOME OTHER MANNER.

The appellee's contentions on this point are as follows:

- a. That the subject of towing is such a simple procedure that it is within the common knowledge of the average layman and is therefore not the subject of expert testimony.
- b. That the testimony would call for an opinion of ultimate fact and would invade the province of the jury.
- c. That it is not proof of negligence to prove that something may be done in a different way.
- d. That there was insufficient foundation for the testimony.

Appellee has made some general statements of law to support his contentions, which statements as general rules of law are no doubt correct. But appellee has neglected to apply these rules of law to the facts of this case and cited no specific cases to support his contentions. We shall consider each of his contentions in order.

a. This contention fails by its own statement. The average person does not know anything about towing. The appellant frankly asks the Court if they know enough about towing procedures to know whether a towing job is done properly or not. We renew the suggestion made in the opening brief that the Court read the appellee's description of the towing job in question as found in the testimony at pages 299-302 of the Transcript of Record. The Court will realize from this statement by the defendant himself that towage is a very technical and complicated operation. In fact, the defendant's whole testimony as to the description of his wrecker and his activities on the night of the accident would convince anyone that towage is not something that is within the common knowledge and understanding of the average juror.

As a question of law, appellee has not cited one single case to support his contention that towage is not a proper subject for expert testimony, while, on the other hand, appellants in their opening brief cited numerous cases and specific instances to show that mechanical operations and procedures such as towage are a proper subject for expert testimony.

b. The offered testimony would not invade the province of the jury. A reading of the record will show the Court that the offered testimony was not an attempt to draw any statements from the witness as to the right or wrong way to do the job or to solicit any opinions as to negligence or non-negligence. The offered testimony went solely to custom of doing the job and whether or not it was practical in this particular case to follow the custom. Appellants on page 23 of their opening brief cited authority that evidence of custom and usage is admissible on the question of negligence. This is uncontroverted law and appellee has

cited no case or any other authority in opposition thereto. The evidence of custom and usage was proper evidence to be considered by the jury in determining the issue of negligence and did not at all invade the province of the jury or take away their right to determine the ultimate question of negligence.

In any event, when the subject is a proper one for expert testimony such as in this case, opinions as to ultimate facts may be admitted. This is one of the very basic fundamentals of law dealing with the subject of expert and opinion testimony. This principle is recognized in the authorities cited by appellee on pages 8 and 9 of his brief. Another statement of the rule is found in 32 **C.J.S.**, pages 75-76:

"When the conclusion to be drawn from the facts stated depends on professional or scientific knowledge or skill, not within the range of ordinary training and intelligence, the conclusion may be stated by a qualified expert, even though it is the statement of an ultimate fact to be found by the jury. Expert opinion testimony on ultimate facts has been allowed in evidence under particular circumstances as a factor to be weighed and considered by the jury in the final determination of the case, although an expert witness cannot state conclusions on the whole case by summing up the entire issue. An expert may not invade the province of the jury by stating his conclusions as to an ultimate fact when his conclusion is based on conflicting evidence in the case, but his conclusion may be received in evidence if it is based on hypothetical facts which fairly reflect the facts in evidence."

It is appellants' contention that the offered testimony was not going to the ultimate facts of the case, but that it was evidence of custom, usage, and other methods of doing the job, which evidence is admissible on the question of negligence. However, even if it were going to the ultimate facts, such testimony should be admitted under the above stated principles of law as they apply to this case, for as we have already shown the question of towage is not

one within the range of ordinary training or understanding.

c. The appellee had contended that it is not evidence of negligence to show that something may be done in a different way. However, appellee has not cited one single bit of authority for this proposition. Appellants refer the Court to the following authorities cited in their opening brief which specifically hold contrary to the appellee's contention:

137 **A.L.R.**, page 611

Blashfield Ency. of Auto. Law, Vol. 9, Par. 6186.5

Brigham Young University v. Lillywhite, 118 Fed. (2nd) 836.

The question of usage or custom is also involved here, since the offered testimony would show that the custom was to do the job in a different way than the defendant was doing it. We have already pointed out that evidence of usage or custom is admissible on the question of negligence.

However, the matter goes much deeper than that in this case. The defendant had testified that there was no other practical way to do the job (Transcript of Record, pages 297-303). Also as a matter of law the Court instructed the jury that the wrecker could not block the highway any longer than was necessary. (Transcript of Record, pages 326-327, Instruction 26). The offered testimony as to practicability of other methods of doing the job went directly to these two issues. First, to refute the defendant's statement that it couldn't be done in any other way, and, second, to put evidence before the jury that it was not necessary for the wrecker to be blocking the highway. How else could the testimony of the defendant be refuted? How else could the jury be informed that it was not necessary for the wrecker to block the highway except to show that there was another practical method to do the job? Whatever the general rules may be, the question of whether or not there was another practical method of doing the job was a material issue in this case and evidence on that point should have been admitted.

d. Appellee contends that no sufficient foundation was laid for this testimony. Appellants will submit this question on the record (Transcript of Record, pages 350-361). The witness testified that he had many years of experience as a towman in the vicinity of Elko, Nevada, and that he was familiar with the conditions and terrain at the place of the accident and that he knew of the towing customs in that vicinity at that time. We submit to the Court that the hypothetical questions contained all the essential elements. Things mentioned by the appellee in his brief as necessary were road conditions, weather conditions, type of equipment, time of day and so on. The hypothetical question found at page 354-355 of the Transcript of Record describes in detail all of these items, not only by description but by the use of pictures, exhibits, and diagrams on the blackboard. We submit that the appellee's objections on these grounds is not supported by the record.

Nor are they supported as a matter of law. Once again appellee has not cited a single case to support his contention. The law is that in making objections to the qualifications of an expert witness or to a hypothetical question, the objections must be specific so the other party can correct any omissions, or offer further qualifications. In other words, it isn't sufficient to just object for lack of foundation without pointing out specifically what is lacking. The appellants in this case were never given a chance to offer further qualifications or supply any omissions that may have been made in the hypothetical questions.

"Since objections to hypothetical questions asked expert witnesses must be specific, a general objection is insufficient to raise the point that the question is improper as omitting necessary facts, or as assuming facts not in evidence. In such case the objection should point out what necessary facts were omitted, or which facts were included which were not proved. An objection that a hypothetical question assumed a state of facts not in controversy, irrelevant, incompetent, and no foundation laid, is insufficient to raise the point that it was not a proper hypothetical question." 88 **C.J.S.**, page 262.

In **Hobbs v. Union Pac. R.R.**, (Idaho) 108 Pac. (2nd) 841, it was held that objection to expert testimony because "no proper foundation laid" was not sufficiently specific.

Also to the same effect **Willard v. St. Paul City Ry. Co.** (Minn.) 133 N. W. 465.

We submit that the record will substantiate the appellants' position in this matter, that the witness was properly qualified, and that the questions were properly asked.

4. THE COURT ERRED IN REFUSING TO STRIKE THE DEFENDANT'S STATEMENT THAT HIS WRECKER WAS AN EMERGENCY VEHICLE.

Appellee's only response to this matter is that it could not have had any effect on the jury. Yet it remains undisputed that the statement was erroneous and should have been stricken. The case went to the jury with the undisputed statement in the record that the wrecker was an emergency vehicle. Who can say what the jury may have thought about this statement, or whether or not they disregarded it? It would be more natural to assume that they did consider it than that they completely disregarded it. The other instructions, being general in nature, would not correct this matter. The instructions speak about ordinary care and things that were reasonably necessary under the circumstances. The jury might very well of thought that something might be ordinary and reasonable under the circumstances for an emergency vehicle that would not be ordinary and reasonable for other vehicles. In other words, the jury could have followed all of the instructions of the Court and still been prejudiced by this statement. As we tried to point out in our opening brief, the very mention of emergency vehicle is the kind of thing that in and of itself incites high emotions and feelings in people and is not something that they are apt to disregard without specific instructions to do so. We feel that this matter was highly prejudicial.

5. THE COURT ERRED IN REFUSING OFFERED TESTIMONY AS TO CUSTOM AND USAGE IN PUTTING OUT FLAGS, OR OTHER WARNING DEVICES.

Appellee has not questioned or refuted the appellants' statements of law on this matter and apparently concedes that such evidence is normally admissible. Appellee seems to have two contentions. First, that the matter was covered by other witnesses and, second, that the absence of such signals could not have been the proximate cause of the accident.

In reference to the first contention, appellee fails to point out any place in the record where this matter of putting out flags and warnings and the custom of tow men in respect thereto is covered by other witnesses. Appellants have not been able to find any such evidence in the record unless it is the self serving statement of the defendant that he didn't think it was necessary to put out any signals.

This is a matter that goes to the negligence of the defendant and appellants were entitled to show usages and customs in this respect, and this subject was not mentioned, or covered by any other witnesses.

Whether the absence of such warnings was, or was not, a proximate cause of the accident is for the jury to decide and not the appellee. If there had been a warning flag at the top of the hill, the jury could very well have decided that the accident may not have happened. Appellee claims that the evidence shows that the wrecker was visible for a great distance. The evidence was in conflict on this matter and the jury could just have easily decided one way as the other. Under rules of law which the appellee has not disputed, the appellants had a right to offer evidence as to flags and warnings and it was error to reject this testimony.

6. THE COURT ERRED IN GIVING INSTRUCTION NO. 12.

This is the instruction that deals with the duty of a driver to keep a lookout. Appellant in this case is not try-

ing to assert the proposition that a driver is not obligated to keep a lookout. Appellants assert that the instructions, as given, places undue emphasis on the words "clearly and plainly visible without defining to the jury any standard by which they may determine what is clearly and plainly visible. The cases cited in the opening brief suggest some of the things that should be taken into consideration, such as distractions, obstructions, confusing situations, and the right which a driver has to assume that the road is clear. The fact that these cited cases may have been decided as matters of law, only makes it more apparent that these same factors should be taken into consideration when the question is close enough to require submission to a jury.

An instruction given on this subject should have been clear and comprehensive enough to define plain sight and suggest what the jury was entitled to consider in connection therewith. The appellants requested that certain additions be made to this instruction and the Court refused. We believe it was prejudicial error to give this instruction without at least making the additions requested by the appellants. Appellee suggested that the question of whether or not the wrecker was clearly and plainly visible has been resolved against the appellants by the jury. We suggest that the reason it was so resolved against the appellants is that the jury was not properly instructed on that subject.

7. THE COURT ERRED IN REFUSING TO GIVE APPELLANTS' OFFERED INSTRUCTION A.

This is the instruction dealing with the separate rights of the plaintiffs. The appellee does not question the law that the rights of the various plaintiffs should be dealt with separately, but he feels that the same has been adequately covered in other instructions.

While there were many instructions on the rights, duties and defenses of the various plaintiffs, there is no clear cut simple instruction telling the jury to consider the rights of the plaintiffs separately. The jury could easily get confused in a case such as this where the issues are complex. Under the law stated in the opening brief, appellants

believe they are entitled to this instruction as a matter of right, and it was error to refuse the same.

8. THE COURT ERRED IN REFUSING TO GIVE APPELLANTS' OFFERED INSTRUCTION G.

This is the instruction that deals with defendant's wrecker as an emergency vehicle. Appellants have covered this matter in No. 4 of this brief. For the reasons stated therein appellants were prejudiced by the Court's refusal to give this instruction.

9. THE COURT ERRED IN REFUSING TO GIVE APPELLANTS' OFFERED INSTRUCTION I.

This is the instruction dealing with the Nevada Statute in reference to parking on the highway.

Apparently the appellee does not refute the merits of this instruction, or the law relating thereto, at least he has not so stated in his brief. Therefore, the appellants again urge upon the Court the considerations in connection with this instruction which are set forth in the opening brief.

The appellee has objected to the procedural manner in which this issue was raised. Appellee says the appellants did not object to the Court's refusal to give this instruction. A complete reading of the transcript of record in reference to settling instructions will show that the appellee is only playing with words (Transcript of Record, pages 306-314). The record will show that the plaintiffs presented to the Court certain instructions, some of which were given and some of which were not. Of those which were not given, a group was selected and lettered from A to M and a formal request was made of the Court to give these instructions, which request was refused by the Court. It is obvious from reading the record at page 309 that this group of Instruction lettered from A to M were those instructions which had been rejected by the Court and to which rejection the plaintiffs had taken exception. At page 309 of the record a formal offer of these instructions is made by the plaintiffs and a formal rejection is made by

the Court. We contend that nothing more is required to show that plaintiffs objected to the refusal to give these instructions. The intent is clear from the record. Also at page 313 of the Transcript of Record, the plaintiffs said at the conclusion of the settling of instructions, "If the Court please, may I have the record show that in the offer of the instructions of A to M, inclusive, that each of the plaintiffs severally request each and every one of the instructions from A to M, inclusive."

The above language, although not using the word "objection," is clearly stated and equivalent to an objection and shows clearly, positively and unmistakably that plaintiffs were reserving an exception to the refusal of the Court to give these instructions. The record leave no question as to the intent of the parties and as to the substance of what actually happened at the settling of instructions. The law will not allow the substantive rights of the parties to be defeated by a mere form of words.

In this connection we call to the attention of the Court Rule 46 of the Federal Rules of Civil Procedure that "formal exceptions to rulings or orders of the Court are unnecessary." It has been held that Rule 51 of the Federal Rules of Civil Procedure in reference to objecting to instructions must be read in conjunction with said Rule 46.

Wright v. Farm Journal (C.C.N.Y., 1947) 158 Fed. (2nd) 976.

Williams v. Powers (C.C.A. Ohio, 1943) 135 Fed. (2nd) 153

Montgomery v. Virginia Stage Line (1951) 191 Fed. (2nd) 770.

It is held in the cases on this subject that the purpose of objections to instructions is to inform the trial judge of possible errors and if the trial judge is clearly advised, it is sufficient. The Court said in **Howers v. Roberts**, (C.C.A., Mo., 1946) 153 Fed. (2nd) 726:

"The purpose of this rule concerning objections to instructions is to insure that the trial judge is informed of possible errors and to give him an opportunity to correct them and it is sufficient if the point urged on appeal was called to the attention of the trial court in such manner as clearly to advise it as to the question of law involved."

And in **Williams v. Bowers**, Supra, "This rule should be read in conjunction with Rule 46, the purpose of the rule being to inform the trial judge of possible errors which he may correct, and where the record discloses that the point urged on appeal was called to the attention of the trial judge in such manner as to clearly advise him of the question of law involved, that is sufficient."

Also see **U.S. v General Motors Corp.**, (C.A., Del. 1955) 226 Fed. (2nd) 745, which holds the same thing.

In the **Howers v. Roberts** case mentioned above, the facts were similar to the case at bar. The plaintiff had orally requested that certain instructions be given, but the judge refused to give the same and indicated his reason therefor. The appeal Court held that notwithstanding the plaintiff's failure to object or explain her contention in regard thereto more fully, the refusal of instruction was preserved for appeal.

The record in this case is sufficiently clear to show that plaintiffs' offered instructions A to M were fully considered by the trial court and that the court and all the parties were fully aware of the points of law involved therein. When these particular instructions A to M were picked out of all the other instructions offered by plaintiffs and specially lettered for identification and included in the record in that manner, it was the understanding of all the parties and also the understanding of the trial court that these were the refused instructions that the plaintiffs were reserving for exception. Under the law as cited above this was sufficient.

10. THE TRIAL COURT ERRED IN REFUSING TO GIVE APPELLANTS' OFFERED INSTRUCTION J.

This is the instruction defining what the jury may take into consideration in determining whether an object is clearly or plainly visible. This subject has been covered under point No. 6 herein.

11. IT WAS ERROR FOR THE TRIAL COURT TO REFUSE TO GRANT APPELLANTS' MOTION FOR A NEW TRIAL.

Appellees only contention in reference to this matter is that the question to be decided on a motion for new trial is whether the jury might have reasonably found from the evidence as they did. Appellee has cited no authority for this contention nor has appellee cited any authority contrary to the cases cited in appellants' opening brief. The authorities there cited hold it is the judge's duty on a Motion for New Trial to prevent a miscarriage of justice even though there might have been some evidence to support the verdict of the jury. We will stand on these authorities and re-urge them upon the Court.

Considering the evidence as a whole and the errors of law which have been urged on this appeal, it was the duty of the trial court to grant a new trial to prevent a miscarriage of justice.

In conclusion appellants submit that the appellee has not cited any substantial authority or given any other substantial refutation to the errors which have been specified in this appeal. These errors have been summarized in appellants' opening brief at page 44 and 45, and by reason of said errors the appellants were prejudiced and prevented from having a fair and impartial trial. Appellants submit that the judgments against the appellants and the Order

denying motion for a new trial be reversed and the case be remanded to the trial Court with proper instructions.

Respectfully submitted,

WRIGHT & EARDLEY

GOLDWATER, TABER & HILL

HERMAN BEDKE

BY George F. Wright

ATTORNEYS FOR APPELLANTS

No. 15187

**United States
Court of Appeals**
for the Ninth Circuit

S. B. HUFFMAN, Trustee in Bankruptcy of
Charles Manfre Transportation Co., Bankrupt,
Appellant,
vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Washington 25, D. C.;

LLOYD H. BURKE,

United States Attorney,
U. S. Post Office Building,
San Francisco, California,

Attorneys for Appellee.

In the Southern Division of the United States District Court for the Northern District of California

No. 43,148—In Bankruptcy

In the Matter of

CHARLES MANFRE TRANSPORTATION CO.,
a Corporation,

Bankrupt.

PETITION FOR ORDER REQUIRING AS-
SERTED LIEN CLAIMANT TO PRO-
POUND CLAIM

Comes now S. B. Huffman, and respectfully represents:

That he is the duly appointed, qualified and acting Trustee of the estate of the above-named bankrupt;

That on or about March 2, 1954, Utility Trailer Sales Company of San Francisco took possession of four (4) used Utility Van Semi-Trailers, numbered 19308, 19309, 19310, and 19311, which equipment was being purchased by the bankrupt from said Utility Trailers Sales Company of San Francisco; that thereafter Van No. 19310 was sold to George Takehara and I. J. Joseph on April 16, 1954, by said Utility Trailer Sales Company of San Francisco for the sum of \$3,605.00;

That thereafter Vans Nos. 19308, 19309, and 19311 were sold to John Freitas Transfer on June

23, 1954, by said Utility Trailer Sales Company of San Francisco for the sum of \$11,643.75;

That on or about March 9, 1954, there was served on Utility Trailer Sales Company of San Francisco a document entitled "Levy", which document purported to be executed on behalf of the District Director of Internal Revenue, and purported to be notice that all property in the hands of the said Utility Trailer Sales Company of San Francisco and belonging to Charles Manfre Transportation Co., Inc., was seized and levied upon; that other than the service of said document no seizure, levy, or reduction to possession was made by or on behalf of said District Director of Internal Revenue so far as is known to your petitioner;

That on September 14, 1955, your petitioner filed a Petition for Turnover Order against Utility Trailer Sales Company of San Francisco, and thereafter, on October 24, 1955, this Court made its order that said Utility Trailer Sales Company of San Francisco pay over and deliver unto petitioner the total amount of \$2,309.49 in full settlement of the claim of your petitioner against said Utility Trailer Sales Company of San Francisco; that said order of this Court was made and entered pursuant to an agreement between counsel for your petitioner and counsel for Utility Trailer Sales Company of San Francisco, the effect of which agreement was that petitioner agreed to indemnify Utility Trailer Sales Company of San Francisco against having to

make duplicate payment of the same sums to the United States in response to said purported levy;

That these bankruptcy proceedings were commenced June 4, 1954; that said sum of \$2,309.49 has been paid to petitioner by said Utility Trailer Sales Company of San Francisco.

Wherefore, your petitioner prays that an order be made and entered herein directing the District Director of Internal Revenue Service, San Francisco District, to file and propound with the above-entitled Court for hearing and determination his verified claim of lien against, or interest in, said \$2,309.49 above-referred to, or for such other, further or different order or relief as to this Court may seem just in the premises.

Dated: October 26, 1955.

/s/ S. B. HUFFMAN,
Petitioner.

NEWMARK & STRONG,
By /s/ M. M. NEWMARK,
Attorneys for Petitioner.

Duly verified.

[Endorsed]: Filed November 1, 1955.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon consideration of the annexed trustee's Petition for Order Requiring Asserted Lien Claimant

to Propound Claim, and good cause appearing therefor,

It Is Hereby Ordered that District Director, Internal Revenue Service, San Francisco District, be and he hereby is required to appear before Honorable Bernard J. Abrott, Referee in Bankruptcy, at his courtroom, Room 220, Post Office Building, Thirteenth and Alice Streets, Oakland, California, in said District, on the 7th day of December, 1955, at the hour of 11:00 a.m. of said day, to show cause, if any there be, why the prayer of said trustee's Petition should not be granted; and

It Is Hereby Further Ordered that District Director, Internal Revenue Service, San Francisco District, file his answer in writing with this Court, asserting such claim of lien or interest as he may have or assert in or to the sum of \$2,309.49 referred to in said trustee's Petition, or be forever thereafter barred from so asserting same, and that he serve a copy of said answer upon Newmark & Strong, the attorneys for said trustee, at 1001 Crocker Building, 620 Market Street, San Francisco 4, California, either personally or by mail at least five (5) days prior to the date set for the hearing of this Order to Show Cause; and

It Is Hereby Further Ordered that a copy of this Order to Show Cause, and of the Petition of said trustee herein referred to, be served upon said District Director, Internal Revenue Service, San Francisco District, at least ten (10) days before

the return day, either by the delivery thereof personally unto the said respondent, or by mailing a copy thereof to said respondent.

Dated: November 1, 1955.

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy.

[Endorsed]: Filed November 1, 1955.

[Title of District Court and Cause.]

RESPONSE TO PETITION AND TO THE ORDER TO SHOW CAUSE

Comes now the United States of America and in answer to the petition for turnover order on file herein:

I.

Alleges that the following taxes were assessed against the bankrupt:

Type of Tax	Period	Amount Outstanding	Assessment List Received	Notice of Lien Filed
Transportation....	5/23	\$ 1,212.34	6/15/53	9/17/53
”	.... 2/52	413.26	8/31/53	12/24/53
”	.... 5/54	1,530.90	5/ 4/54	
”	.... 5/54	242.58	5/ 4/54	
Income.....	5/51	320.23	6/25/51	12/24/53
F.E.W.....	9/51	5,693.61	1/21/52	1/24/52
”	..... 4/52	1,890.49	5/ 5/52	6/12/52
”	..... 6/52	1,187.39	10/30/52	2/ 3/53
”	..... 3/52	1,374.86	6/29/53	10/ 2/53
”	..... 3/53	1,482.91	2/15/54	3/15/54
”	..... 4/53	467.80	2/15/54	3/ 8/54

\$15,816.37

Added to the above figure is the five per cent non-payment penalty and six per cent interest from date of assessment, resulting in the figure of \$18,457.57 referred to in the levy as the obligation of Charles Manfre Transportation Co., Inc.

The above-listed liens were reduced to possession on March 9, 1954, when a levy was served on Utility Trailer Sales Company by the District Director of Internal Revenue. Said levy demanded that all property, rights to property, moneys, credits and bank deposits in Utility Trailer Sales Company's possession belonging to Charles Manfre Transportation Co., Inc., be delivered to the District Director, to be applied on said taxpayer's indebtedness for the Federal tax liens. Inasmuch as the taxpayer was not adjudicated a bankrupt until June 4, 1954, the levy reduced the Federal tax liens to possession prior to bankruptcy in accordance with Section 67(c) of the Bankruptcy Act. *U. S. v. Eiland, Trustee*, 223 F. 2d 118.

II.

Alleges that the Trustee has no right, title or interest in the property previously seized by the District Director, and that the same is the sole property of the United States.

III.

Contends that this Court is without jurisdiction to determine whether or not the Utility Trailer Sales Company of San Francisco is liable to the United States under Section 3710 of the Internal

Revenue Code (1939), Title 26 U.S.C., for non-compliance with the levy in the event it does not direct the trustee to pay over to the District Director the sum levied upon.

Wherefore, having duly responded, United States of America prays:

1. That its claim as hereinbefore set forth be recognized as valid against and prior to the sum of \$2,309.49 held by the trustee herein.

2. That the trustee be directed to turn over the sum of \$2,309.49, which is the property of the United States.

LLOYD H. BURKE,

United States Attorney;

By /s/ CHARLES ELMER COLLETT,

Assistant United States

Attorney;

/s/ GEORGE MARISCAL,

Attorney, Office of Regional Counsel, Internal Revenue Service.

Receipt of copy acknowledged.

[Endorsed]: Filed January 17, 1956.

[Title of District Court and Cause.]

TURNOVER ORDER

The Court having issued an Order to Show Cause on the verified petition of S. B. Huffman, Trustee

of the above-named bankrupt estate, directing the District Director of Internal Revenue to propound his lien claim to the sum of \$2,309.49 paid to petitioner by Utility Trailer Sales Company, and the United States having filed the response thereto, and the same having come on regularly for hearing on the 18th day of January, 1956; and

The Court having received and considered the matter in evidence, and having heard M. M. Newmark, Esq., attorney for said Trustee, in support of said petition, and Lloyd H. Burke, Esq., United States Attorney; Charles Elmer Collett, Esq., Assistant United States Attorney; and George Mariscal, Esq., Attorney, Office of the Regional Counsel, Internal Revenue Service, on behalf of the United States of America and the Director of Internal Revenue, makes the following Findings of Fact:

(1) That prior to March 9, 1954, Manfre Transportation Company, Inc., was indebted to the United States for transportation, income, and withholding employment taxes in the sum of \$18,457.57. That statutory liens were filed in Santa Cruz County, the place of business of the above-named taxpayer, prior to March 9, 1954.

(2) That prior to March 9, 1954, Utility Trailer Sales Company of San Francisco, California, repossessed several trailers on a conditional sales contract to the above-named taxpayer; that on **March 9, 1954**, the United States of America by

and through its District Director of Internal Revenue did cause a levy to be made on said Utility Trailer Sales Company, directing that all property, rights to property, moneys, credits, and bank deposits in the possession of said Utility Trailer Sales Company belonging to Charles Manfre Transportation Co. be delivered to said District Director, to be applied on said Charles Manfre Transportation Co.'s indebtedness for Federal tax liens; that the obligation of the Utility Trailer Sales Company at the time said levy was served to said Charles Manfre Transportation Co. was \$2,309.49; that said obligation was not paid to the United States, but when the taxpayer was adjudicated a bankrupt July 4, 1954, the same was paid to the Trustee who now holds it.

From said findings, this Court concludes that the levy of the United States by and through its District Director of Internal Revenue on or about March 9, 1954, against Utility Trailer Sales Company for property belonging to Charles Manfre Transportation Co., effected a seizure of the obligation of \$2,309.49 on behalf of the same and reduced it to the possession of the United States; and that the Trustee herein is without any right, title or interest in said sum of \$2,309.49 paid on the obligation.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the above-named Trustee turn over to the United States of America the sum of \$2,309.49, and that upon so doing he be discharged

from all further liability in connection with said sum of money.

Dated at Oakland, California, this 26th day of January, 1956.

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy.

[Endorsed]: Filed January 26, 1956.

[Title of District Court and Cause.]

PETITION FOR REVIEW

To the Honorable Bernard J. Abrott, Referee in Bankruptcy:

The petition of S. B. Huffman, Trustee in Bankruptcy herein, respectfully represents:

(1) Your petitioner is aggrieved by the order herein of Bernard J. Abrott, Referee in Bankruptcy, dated January 26, 1956, a copy of which order is annexed hereto, marked Exhibit "A", and made a part hereof;

(2) The Referee erred in respect to said order in that:

(a) In the Findings of Fact it is stated (page 2, line 7) that on March 9, 1954, the United States of America by and through its District Director of Internal Revenue, did cause a levy to be made on said Utility Trailer Sales Company, whereas in truth and in fact on March 9, 1954, only a written notice of levy was served on Utility Trailer Sales

Company of San Francisco in the City and County of San Francisco, State of California;

(b) In the Findings of Fact is stated (page 2, line 17) that when the taxpayer was adjudicated a bankrupt July 4, 1954, the said obligation of \$2,309.49 was paid to the Trustee, whereas in truth and in fact the said sum was not paid to the Trustee until October 27, 1955, after hearings upon a petition filed by the Trustee for a Turnover Order and the granting of said petition and the issuance of a Turnover Order.

(c) The Findings of Fact fail to state the location of the trailers on March 9, 1954, although it was admitted in open court that on said date they were not in Santa Cruz County, State of California.

(d) The Order concludes (page 2, line 23) that the levy on or about March 9, 1954, against Utility Trailer Sales Company for property belonging to Charles Manfre Transportation Co., effected a seizure of the obligation of \$2,309.49 and reduced it to the possession of the United States. Said conclusion is erroneous and is contrary to law, as there was no accompaniment of such possession as is required by Section 67(c) of the Bankruptcy Act.

(e) The Order concludes (page 2, line 25) that the Trustee herein is without any right, title or interest in said sum of \$2,309.49 paid on the obligation. Said conclusion is erroneous and is contrary to law, as said sum is subject to a first payment

therefrom of the actual and necessary costs and expenses of preserving the estate of said bankrupt subsequent to the filing of the petition in bankruptcy as provided in Section 67(c) and Section 64(1) of the Bankruptcy Act.

Wherefore, your petitioner prays that said order be reviewed by a judge in accordance with the provisions of the Act of Congress relating to Bankruptcy, that said Order be reversed; that the Turn-over Order be annulled and that your petitioner have such other and further relief as is just.

Dated: March 1, 1956.

/s/ S. B. HUFFMAN,
Petitioner,

By /s/ M. M. NEWMARK,
One of His Attorneys.

NEWMARK & STRONG,
By /s/ M. M. NEWMARK,
Attorneys for Petitioner.

[Endorsed]: Filed March 2, 1956.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON PETITION
TO REVIEW TURNOVER ORDER RELATIVE
TO CLAIM OF DISTRICT DIRECTOR
OF INTERNAL REVENUE

The undersigned, one of the Referees in Bankruptcy, in accordance with the provisions of Sec-

tion 39(a) (8) of the Bankruptcy Act, hereby certifies as follows:

I.

Preliminary Proceedings

On June 4, 1954, Charles Manfre Transportation Co., a corporation, filed a voluntary petition in bankruptcy. That on June 7, 1954, the said Charles Manfre Transportation Co., a corporation was adjudicated a bankrupt and the matter was referred to the undersigned as Referee in Bankruptcy to take such further proceedings as may be required by said Bankruptcy Act. That on June 25, 1954, Geo. Schipper of Watsonville, California, was duly appointed Trustee of said estate. That a vacancy having existed in the office of trustee by reason of the death of said Geo. Schipper, the undersigned caused notice to be sent to all creditors of said bankrupt estate for the purpose of electing or appointing a new trustee. That on the 27th day of August, 1954, S. B. Huffman of Santa Cruz, California, was duly appointed Trustee of said estate and ever since said date has been and still is the duly qualified and acting trustee of said estate.

That on November 1, 1955, S. B. Huffman, as trustee filed his Petition for Order Requiring Asserted Lien Claimant to Propound Claim and on the same date, pursuant to the prayer of said petition, the undersigned Referee issued an Order to Show Cause directing the District Director, Internal Revenue Service, to file his answer in writing

with this Court asserting such claim of lien or interest as he may have or assert in or to the sum of \$2,309.49 in the possession of said Trustee. (There is forwarded herewith as a part of this Certificate, Petition for Order Requiring Asserted Lien Claimant to Propound Claim filed November 1, 1955, and Order to Show Cause filed November 1, 1955.)

That on January 17, 1956, the United States of America filed its Response to Petition and to the Order to Show Cause. (There is forwarded herewith as a part of this Certificate Response to Petition and to Order to Show Cause filed January 17, 1956.)

II.

Statement of Question Presented

The order being reviewed directs the Trustee in Bankruptcy to turn over to the United States of America the sum of \$2,309.49.

III.

Hearing

At the time and place fixed for the hearing of Trustee's Petition and Order to Show Cause and United States of America's Response thereto, it was stipulated by and between Milton Maxwell Newmark, Esq., on behalf of said Trustee, and George Mariscal, Esq., on behalf of the United States of America and the Director of Internal Revenue, that the matter be submitted upon an

agreed statement of facts. (The agreed statement of facts together with oral statements of respective counsel are contained in Transcript of Proceedings, filed March 28, 1956, and forwarded herewith as a part of this Certificate.)

That on January 26, 1956, the undersigned Referee in Bankruptcy made a Turnover Order directing the Trustee to turn over to the United States of America the sum of \$2,309.49. (The original Turnover Order filed January 26, 1956, is forwarded herewith as a part of this Certificate.)

IV.

Review

That on March 2, 1956, and within the time allowed by law, S. B. Huffman, Trustee of said estate, filed his Petition for Review. (The original Petition for Review, filed March 2, 1956, is forwarded herewith as a part of this Certificate.)

Dated at Oakland, California, this 12th day of April, 1956.

Respectfully submitted,

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy.

[Endorsed]: Filed April 12, 1956, Referee.

[Endorsed]: Filed April 13, 1956, U.S.D.C.

In the District Court of the United States for the
Northern District of California, Southern Division
No. 43148

In the Matter of
CHARLES MANFRE TRANSPORTATION CO.,
a Corporation,

Bankrupt.

ORDER

The Order, Judgment and Decree of the Referee in Bankruptcy in the above-entitled action, dated January 26, 1956, is hereby affirmed.

The Findings of Fact made by the Referee in Bankruptcy in his Order of January 26, 1956, are hereby approved and adopted by this Court as its Findings of Fact.

The levy by the United States on March 9, 1954, on the Utility Trailer Sales Co. of San Francisco effected a seizure of the obligation of \$2,309.49 due to the Charles Manfre Transportation Co., a corporation, and reduced it to the possession of the United States. *U. S. v. Eiland*, 4 Cir., 223 F. 2d 118. When said Charles Manfre Transportation Co. was adjudicated a bankrupt on June 7, 1954, the Trustee in Bankruptcy appointed in said proceedings acquired no rights to said sum of \$2,309.49 as against the United States.

Dated: May 16, 1956.

/s/ O. D. HAMLIN,

United States District Judge.

[Endorsed]: Filed May 16, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Lloyd H. Burke, United States Attorney, and to
the United States of America, Respondent
Herein:

Notice Is Hereby Given that S. B. Huffman,
Trustee in Bankruptcy herein, hereby appeals to
the United States Court of Appeals for the Ninth
Circuit from the Order of this Court entered on
May 16, 1956, which affirmed the Turn Over Order
of the Referee in Bankruptcy, dated January 26,
1956.

Dated this 25th day of May, 1956.

/s/ MILTON MAXWELL
NEWMARK,

/s/ PAUL E. ANDERSON,
Attorneys for Appellant, S. B. Huffman, Trustee
in Bankruptcy.

[Endorsed]: Filed May 25, 1956.

In the Southern Division of the United States District Court, for the Northern District of California

No. 43148

In the Matter of

CHARLES MANFRE TRANSPORTATION CO.,
a Corporation,

Bankrupt.

Before Honorable Bernard J. Abrott, Referee in
Bankruptcy.

TRANSCRIPT OF PROCEEDINGS

January 18, 1956—11:00 A.M.

The Referee: Charles Manfre Transportation.

Mr. Newmark: Now, if the Court please, this is a controversy between the District Director of Internal Revenue and the Trustee in Bankruptcy of Charles Manfre Transportation Company as to the sum of \$2,309.49, which sum is now in the possession of such Trustee in Bankruptcy. This sum represents the proceeds received by the Trustee in Bankruptcy from Utility Trailer Sales Company of San Francisco as a result of *an made* after several days' hearing before your Honor. I might ask Mr. Mariscal, are all your assertions of right and claim set forth in your responsive pleading?

Mr. Mariscal: By right and claim you mean—

Mr. Newmark: Specifically, did the United States in addition to the levy which was alleged in here, did the United States record—

Mr. Mariscal: Yes, they're recorded. There is

notice of lien filed right on the claim there for your Federal employment withholding, 6/12/52, 1/24/52. That's the date that the liens were filed in the County Recorder's office.

Mr. Newmark: In what county?

Mr. Mariscal: In the particular county. Watsonville would be Santa Cruz County, wouldn't it?

Mr. Newmark: In other words——

Mr. Mariscal: These are the dates that they were filed in [1*] the particular county where Manfre Transportation was doing business at Watsonville and I don't recall the county seat—it would be——

Mr. Newmark: I think Santa Cruz County.

The Referee: It's either Santa Cruz or Monterey.

Mr. Newmark: Watsonville, Santa Cruz. Were any of these liens recorded in either San Francisco County or Sacramento County?

Mr. Mariscal: Not to my knowledge. Recorded Santa Cruz County, Santa Cruz. This is No. 536070-72.

Mr. Newmark: I might say I checked in San Francisco County but as you appreciate those things are in such a horrible mess I can't say positively I couldn't find any.

Mr. Mariscal: These are copies of Federal liens filed; they're all in Santa Cruz.

Mr. Newmark: All in Santa Cruz County.

Mr. Mariscal: Santa Cruz, Santa Cruz, recorded in Santa Cruz, Santa Cruz, Santa Cruz, all of them.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Newmark: All right, all in Santa Cruz.

Mr. Mariscal: Santa Cruz.

Mr. Newmark: Thanks. The point of time in which we are interested is 3:05 p.m. on March 9, 1954, at which time a Treasury Department Form 68(a), which is entitled "Levy" was served upon the Utility Trailer Sales Company of San Francisco and it was served in San Francisco. Now, I will offer this in evidence as the Trustee's Exhibit A or 1. [2]

The Referee: No. 1.

(The document referred to was received in evidence by the Referee and marked Trustee's Exhibit No. 1.)

TRUSTEE'S EXHIBIT No. 1

Form 668-A

U. S. Treasury Department

Internal Revenue Service

Levy

United States of America,
San Francisco Collection District,
State of California.

To Utility Trailer Sales Co. of San Francisco,
John N. Baird, Jr., President,
At San Francisco, California.

You are hereby notified that there is now due, owing, and unpaid from Charles Manfre Transpor-

tation Co., Inc., 720 Walker Street, Watsonville, California, to the United States of America the sum of Eighteen Thousand Four Hundred Fifty-seven and 57/100 dollars (\$18,457.57) as and for an internal revenue tax.

You are further notified that all property, rights to property, moneys, credits and/or bank deposits now in your possession and belonging to the aforesaid taxpayer and all sums of money owing from you to the said taxpayer are hereby seized and levied upon for the payment of the aforesaid tax, together with penalties and interest, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth above from the amount now owing from you to the said taxpayer, or for such lesser sum as you may be indebted to him, to be applied in payment of the said tax liability.

Dated at Watsonville, California, this 2nd day of March, 1954.

GLEN T. JAMISON,
District Director of
Internal Revenue,

By /s/ REMO N. CIPOLLA,
Supervising Group Chief
Collections.

This Levy Served By Joseph L. Rasman, IRA,
CO.

Date 3/9/54; Time 3:05 p.m..

Received in evidence January 18, 1956.

Mr. Newmark: Now, at the date and at the time of that levy, as set forth in the verified petition of the Trustee, there were four used utility vans, semi-trailers, which vans had been purchased prior thereto from the Utility Trailer Sales Company and which vans——

The Referee: Is that the bankrupt?

Mr. Newmark: Purchased by the bankrupt from the alleged garnishee and prior to the date of that levy, which vans—the four vans were got into the possession of the alleged garnishee. These four vans remained in the garnishee's possession until a date subsequent to the date of the levy. As to some of them, April 16, and as to some of them, June 23, so that at the date and time of the levy, the vans were in the possession of the garnishee. If it becomes relevant, I would ask leave to introduce documentary evidence as to the date of the title of those vans at that time as reflected by the records of the Motor Vehicle Department. It is my opinion that Utility Trailer Sales Company was shown as the legal owner and the bankrupt as the registered owner but that evidently the vans were physically in the possession of the alleged garnishee at the time of the levy. The principal place of business of the alleged garnishee is the City and County of San Francisco. These vans were either at the moment of levy in San Francisco or in Sacramento. We [3] have been unable to establish definitely that they were at this time. If it becomes relevant, we can establish exactly where they were. At any event, they were not at either Santa Cruz County or

Monterey County. They were either in the Utility Trailer Sales yard in Sacramento County or they were in their yard or Bayshore property in San Francisco County. Other than the levy—of the alleged levy—the service upon a representative of the alleged garnishee of that notice, nothing further was done as far as the alleged garnishee is concerned. At the moment of the alleged levy, there was a question—a debatable question as to whether any amount ever was due to the bankrupt from the garnishee. Subsequently——

The Referee: Pardon me, Mr. Newmark, a part of your remarks the Court construes as factual and in another part of your remarks are in the nature of a contention of the Trustee. Now, before I can intelligently follow——

Mr. Newmark: You want to know what I am saying.

The Referee: I want you and Mr. Mariscal, if you can stipulate as far as the facts are concerned.

Mr. Mariscal: I will stipulate as far as the facts are concerned as to this: That the trailers were purchased by Manfre Transportation, that they were purchased from Utility Trailer Sales, that the trailers were not in Santa Cruz County on March 9, 1954, when we served our levy, and now about the legal ownership as to the state, I am not sure that it has any bearing. [4]

Mr. Newmark: I'm not either.

Mr. Mariscal: And furthermore, I don't know——

The Referee: It doesn't matter to the Court.

Mr. Mariscal: It doesn't matter. Which in effect are the facts he has gone through except for the legal ownership.

The Referee: Except one other item. And Mr. Newmark, you will stipulate that the Internal Revenue Department recorded——

Mr. Newmark: Oh, yes, sir, Mr. Mariscal said they did.

The Referee: In Santa Cruz.

Mr. Mariscal: In Santa Cruz their liens were recorded where the man was doing business.

The Referee: Now, where else do we need facts?

Mr. Mariscal: That's about the size of it.

Mr. Mariscal: Plus the date of the bankruptcy, which was subsequent to the levy, which was June 4, 1950.

The Referee: June 4, 1950. Would you gentlemen be concerned about the place of business of the bankrupt in your stipulation?

Mr. Newmark: If Mr. Mariscal wishes, we will stipulate that he did business in Santa Cruz County.

Mr. Mariscal: In Watsonville.

Mr. Newmark: In Watsonville.

Mr. Mariscal: Because all his notices and everything were published in the Watsonville newspaper and we have those here.

The Referee: The petition in bankruptcy says "the petition of Charles Manfre Transportation Company, a corporation, [5] residing at"—that's

exactly the way it says—"residing at Fort and Wall Streets in Watsonville, County of Santa Cruz."

Mr. Mariscal: Right.

Mr. Newmark: I would like counsel to stipulate to one additional fact which I mentioned here, that other than the service of the purported notice of levy upon Utility Trailer Sales Company, the Collector did nothing further with respect to Utility Trailer Sales Company.

Mr. Mariscal: By that, you are referring to reducing the intangible to possession.

Mr. Newmark: Well, whatever it was. You took no further action with respect to them.

Mr. Mariscal: No, that's all we did.

Mr. Newmark: That's all you did.

Mr. Mariscal: We served them with a levy and that certified receipt of the levy, the date of the exhibit, you offered into evidence.

Mr. Newmark: Fine. Those are the facts, your Honor. [6]

* * *

The Referee: Gentlemen, will you each stipulate that the petition in bankruptcy and the order of adjudication be considered a part of the factual record?

Mr. Newmark: Certainly.

Mr. Marascal: Certainly.

The Referee: Very well.

[Endorsed]: Filed March 28, 1956.

[Title of District Court and Cause.]

ARGUMENT ON PETITION FOR REVIEW

Monday, May 7, 1956

The Clerk: In re Charles Manfre.

Mr. Anderson: May it please the Court, this is a hearing on a petition for review of an order of the Referee in Bankruptcy. In the main it involves the effectiveness of a levy which was served by the United States of America, and in checking the records before your Honor we notice that the levy is not part of the record.

This levy was introduced into evidence before the Referee as Exhibit No. 1. I wonder whether counsel for the Government would stipulate that it become a part of the record before your Honor on review?

Mr. Greaves: So stipulated.

* * *

The Court: The matter may be submitted.

[Endorsed]: Filed June 28, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibit, listed below,

are the originals filed in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellant:

One Complete File and Exhibit No. 1.

Transcript of Proceedings.

Transcript of Argument for Petition on Review.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 2nd day of July, 1956.

[Seal]

C. W. CALBREATH,
Clerk,

By /s/ WM. J. FLINN,
Deputy Clerk.

[Endorsed]: No. 15187. United States Court of Appeals for the Ninth Circuit. S. B. Huffman, Trustee in Bankruptcy of Charles Manfre Transportation Co., Bankrupt, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed July 2, 1956.

Docketed July 11, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15187

S. B. HUFFMAN, Trustee in Bankruptcy in the
Matter of CHARLES MANFRE TRANS-
PORTATION CO., a Corporation, Bankrupt,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS TO BE RELIED
UPON AND DESIGNATION OF RECORD

Pursuant to Rule 17(6) of the Rules of Practice of this Court, appellant states the points on which it intends to rely and designates the portion of the record for printing which appellant deems material to the consideration of the appeal.

Statement of Points

1. The court below erred in finding (page 2, line 7, Referee's Findings of Fact adopted by court below) that on March 9, 1954, appellee caused a levy to be made on Utility Trailer Sales Company, whereas in truth and in fact appellee served only a written notice of levy on Utility Trailer Sales Company on that date.

2. The court below erred in finding (page 2, line 17, *ibid.*) that when the taxpayer was adjudicated

a bankrupt July 4, 1954, the obligation of \$2,309.49 was paid to appellant, whereas in truth and in fact the said sum was not paid to appellant until October 27, 1955, after hearings upon a petition filed by the Trustee for a Turnover Order, the granting of said petition and the issuance of a Turnover Order.

3. The court below erred in finding (page 2, line 14, *ibid.*) that the obligation of the Utility Trailer Sales Company at the time said levy was served to the taxpayer was \$2,309.49, whereas in truth and in fact no liquidated sum of money was presently owing by Utility Trailer Sales Company to the taxpayer at the time of levy nor was it possible to determine at that time whether any amount would ever become due; the amount and the existence of the obligation of Utility Trailer Sales Company were not determined until October 27, 1955, after hearings upon a petition filed by appellant for a Turnover Order, the granting of said petition and the issuance of a Turnover Order.

4. The court below erred in concluding (line 23, Order of court below dated May 16, 1956) that the levy on or about March 9, 1954, against Utility Trailer Sales Company for property belonging to the taxpayer effected a seizure of the obligation of \$2,309.49 and reduced it to the possession of the United States. Said conclusion is erroneous and is contrary to law as the levy was not accompanied by possession as required under Section 67c of the Bankruptcy Act.

5. The court below erred in concluding (line 28, Order of court below, dated May 16, 1956) that when the taxpayer was adjudicated a bankrupt on June 7, 1954, appellant, appointed as trustee in bankruptcy in the proceeding, acquired no rights to the said sum of \$2,309.49 as against appellee. Said conclusion is erroneous and contrary to law, as said sum is subject to a first payment therefrom of the actual and necessary costs and expenses of preserving the estate of the bankrupt subsequent to the filing of the petition in bankruptcy and prior wage claims as provided in Section 67c and Section 64(a) of the Bankruptcy Act.

* * *

Dated: This 10th day of July, 1956.

/s/ MILTON MAXWELL NEWMARK,

/s/ PAUL E. ANDERSON,

Attorneys for Appellant, S. B. Huffman, Trustee
in Bankruptcy.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 11, 1956.

No. 15,187

IN THE

United States Court of Appeals
For the Ninth Circuit

S. B. HUFFMAN, Trustee in Bankruptcy
of Charles Manfre Transportation Co.,
Bankrupt,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

On appeal from the United States District Court for
the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

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FILED

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PAUL P. O'BRIEN, CLERK



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No. 15,187

IN THE
United States Court of Appeals
For the Ninth Circuit

S. B. HUFFMAN, Trustee in Bankruptcy
of Charles Manfre Transportation Co.,
Bankrupt,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

On appeal from the United States District Court for
the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

STATEMENT AS TO JURISDICTION.

This case was initiated by a Petition for Order requiring asserted lien claimant to propound claim filed November 1, 1955, before the Honorable Bernard J. Abrott, Referee in Bankruptcy (R. 3-5). On the same day an Order to Show Cause was entered and thereafter served upon appellee (R. 5-7). Appellee submitted to the jurisdiction of the bankruptcy court and filed its Response to Petition and to the Order to Show Cause on January 17, 1956 (R. 7-9). A hearing was had before the said referee and on January 26, 1956, a Turnover

Order was entered in favor of appellee (R. 9-12, 20-27). Appellant perfected a timely appeal to the United States District Court for the Northern District of California, Southern Division, by filing a Petition for Review on March 1, 1956 (R. 12-14). Review was had on the Referee's Certificate on Petition to Review Turnover Order before the Honorable O. D. Hamlin, United States District Judge (R. 28). On May 16, 1956, an order affirming the said Turnover Order was entered and filed (R. 18). Appellant filed a timely Notice of Appeal on May 26, 1956 and served a copy thereof on the appellee (R. 19). The jurisdiction of this Court to hear the appeal is founded on Section 47 of Title 11 of the United States Code (11 U.S.C.A. Sec. 47) and on Section 1291 of Title 28, United States Code (28 U.S.C.A. Sec. 1291).

STATEMENT OF THE CASE.

The facts in this case, as established by the verified petition of appellant (R. 3-5), the response of the appellee (R. 7-9), and the oral stipulations between counsel for the respective parties in the hearing before the Honorable Bernard J. Abrott, Referee in Bankruptcy (R. 20-27), are as follows:

Charles Manfre Transportation Co., herein referred to as the "bankrupt," was purchasing four trucks from Utility Trailer Sales. On March 2, 1954, prior to the bankruptcy proceedings herein, Utility Trailer Sales repossessed the four trucks from the bankrupt. On March 9, 1954, appellee served a Notice of Levy on Utility Trailer

Sales demanding payment for \$18,457.57 of internal revenue taxes owed to appellee by the bankrupt (R. 3-4). The Notice of Levy is set out in full at R. 22-23.

Utility Trailer Sales failed to make delivery to appellee of the four trucks or of any other property or rights to property belonging to the bankrupt in its possession. After receiving service of the Notice of Levy, Utility Trailer Sales sold the four trucks to other persons, one on April 16, 1954, to George Takahara and I. J. Joseph and the other three to John Freitas Transfer on June 23, 1954 (R. 3-4). There is nothing in the record to indicate that appellee took any action to enforce its Notice of Levy either by proceeding against Utility Trailer Sales for its failure to deliver up possession of the trucks (or other property belonging to the bankrupt) or by proceeding against the transferees of Utility Trailer Sales to enforce its lien, if any, on the trucks.

On June 4, 1954, the bankrupt filed its petition for bankruptcy in the court below and was adjudicated a bankrupt on June 7, 1954 (R. 15). During the process of administering the bankrupt's estate for the benefit of its creditors, appellant became aware of the controversy between the bankrupt and Utility Trailer Sales over the repossession of the bankrupt's trucks. As a result, appellant brought a proceeding against Utility Trailer Sales in the bankruptcy court below and after a hearing before the Referee in Bankruptcy was successful in achieving a compromise of the matter. In settlement of appellant's claim on behalf of the bankrupt, Utility Trailer Sales agreed to pay \$2,309.49 into the bankruptcy estate. After approval of the compromise

settlement by the bankruptcy court below on October 24, 1955, the \$2,309.49 was paid to appellant (R. 4-5).

Thereafter appellant initiated the present proceeding in bankruptcy by filing its petition for order requiring asserted lien claimant (appellee) to propound its claim to the \$2,309.49 received from Utility Trailer Sales (R. 3-5). On January 17, 1956, appellee filed its response setting up its lien for \$15,816.37 of income and excise taxes plus penalties and interest for a total of \$18,457.57. Appellee also claimed that the sum of \$2,309.49 had been reduced to its possession by its service of a notice of levy on Utility Trailer Sales twenty-two months earlier. Appellee therefore demanded that the \$2,309.49 not be administered by the bankruptcy court below in accordance with the priorities of the Bankruptcy Act, but that appellant be ordered to turn the money directly over to appellee for application to its claim and lien for taxes. Appellee did not resist or challenge the jurisdiction of the bankruptcy court to dispose of the money (R. 7-9).

The court below entered its order in favor of appellee, and it is the affirmance of this order from which appellant brings this appeal (R. 9-12, 18, 19).

SPECIFICATION OF ERRORS.

1. The court below erred in finding (page 2, line 7, Referee's Findings of Fact adopted by court below) that on March 9, 1954, appellee caused a levy to be made on Utility Trailer Sales Company, whereas in truth and in fact appellee served only a written notice of levy on Utility Trailer Sales Company on that date.

2. The court below erred in finding (page 2, line 17, *ibid.*) that when the taxpayer was adjudicated a bankrupt June 7, 1954, the obligation of \$2,309.49 was paid to appellant, whereas in truth and in fact the said sum was not paid to appellant until October 27, 1955, after hearings upon a petition filed by the Trustee for a Turnover Order, the granting of said petition and the issuance of a Turnover Order.

3. The court below erred in finding (page 2, line 14, *ibid.*) that the obligation of the Utility Trailer Sales Company at the time said levy was served to the taxpayer was \$2,309.49, whereas in truth and in fact no liquidated sum of money was presently owing by Utility Trailer Sales Company to the taxpayer at the time of levy nor was it possible to determine at that time whether any amount would ever become due; the amount and the existence of the obligation of Utility Trailer Sales Company were not determined until October 27, 1955, after hearings upon a petition filed by appellant for a Turnover Order, the granting of said petition and the issuance of a Turnover Order.

4. The court below erred in concluding (line 23, Order of court below dated May 16, 1956) that the levy on or about March 9, 1954, against Utility Trailer Sales Company for property belonging to the taxpayer effected a seizure of the obligation of \$2,309.49 and reduced it to the possession of the United States. Said conclusion is erroneous and is contrary to law as the levy was not accompanied by possession as required under Section 67c of the Bankruptcy Act.

5. The court below erred in concluding (line 28, Order of court below, dated May 16, 1956) that when the tax-

payer was adjudicated a bankrupt on June 7, 1954, appellant, appointed as trustee in bankruptcy in the proceeding, acquired no rights to the said sum of \$2,309.49 as against appellee. Said conclusion is erroneous and contrary to law, as said sum is subject to a first payment therefrom of the actual and necessary costs and expenses of preserving the estate of the bankrupt subsequent to the filing of the petition in bankruptcy and prior wage claims as provided in Section 67c and Section 64a of the Bankruptcy Act.

STATUTE INVOLVED.

Section 67c of the Bankruptcy Act (11 U.S.C.A. Sec. 107c).

“Where not enforced by sale before the filing of a petition initiating a proceeding under this title, and except where the estate of the bankrupt is solvent: (1) though valid against the trustee under subdivision (b) of this section, statutory liens, including liens for taxes or debts owing to the United States or to any State or any subdivision thereof, on personal property not accompanied by possession of such property, and liens, whether statutory or not, of distress for rent shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision (a) of section 104 of this title and such liens for wages or for rent shall be restricted in the amount of their payment to the same extent as provided for wages and rent respectively in subdivision (a) of section 104 of this title; and (2) the provisions of subdivision (b) of this section to the contrary notwithstanding, statutory liens created or recognized by

the laws of any State for debts owing to any person, including any State or any subdivision thereof, on personal property not accompanied by possession of, or by levy upon or by sequestration or distraint of, such property, shall not be valid against the trustee: *Provided, however,* That so much of clause (1) of this subdivision as restricts liens for wages and rent and clause (2) of this subdivision shall not apply in proceedings under chapter 10 of this title, unless an order shall be entered therein directing that bankruptcy be proceeded with, or in proceedings under section 205 of this title. The court may on due notice order so much of any lien in excess of the restricted amount under clause (1) of this subdivision and any lien invalid under clause (2) of this subdivision to be preserved for the benefit of the estate and, in any such event, such lien for the excess and such invalid lien, as the case may be, shall pass to the trustee."

SUMMARY OF ARGUMENT.

The question presented by this appeal may be stated simply: Did the notice of levy served by appellee on Utility Trailer Sales on March 9, 1954 have the effect of taking immediate possession of the sum of \$2,309.49 paid over by Utility Trailer Sales to appellant nineteen months later in a compromise settlement after bankruptcy proceedings had been commenced? Only if appellee had and maintained possession of the \$2,309.49 prior to and on the date of bankruptcy is it entitled to an order awarding it the sum of money free of the administration of the bankruptcy court. Section 67c of the Bankruptcy Act (11 U.S.C.A. Sec. 107c).

1. Appellee did not have actual possession of anything prior to or at the time of the filing of the petition in bankruptcy. All appellee had done was serve a notice of levy on Utility Trailer Sales. This levy was returned unsatisfied. A notice of levy is nothing more than a demand for payment of any property belonging to the bankrupt in the hands of the person served. It is not self-executing. Unless the government takes supplementary action to enforce an unsuccessful levy, or unless the demand is actually complied with, a notice of levy does not transfer possession to the government. Because appellee failed to acquire actual possession over the obligation prior to bankruptcy, it is not entitled to a turnover order requiring appellant to deliver the compromise settlement of \$2,309.49 to it. *Goggin v. Division of Labor Law Enforcement*, (1949) 336 U.S. 118, 69 S.Ct. 469.

2. Assuming *arguendo* that a notice of levy may transfer possession of intangible property in some cases, a notice of levy could not have that effect in this case because the obligation owed by Utility Trailer Sales to the bankrupt was uncertain and unfixed at the time notice of levy was served. The existence of any liability to the bankrupt was then contingent and the amount was then unaccrued. Utility Trailer Sales in fact resisted the payment of any amount on this liability against both appellee and appellant. The only intangible property reached by a notice of levy under Section 3710, I.R.C. 1939, is a liquidated obligation definite in amount and fixed in liability. *United States v. Metropolitan Life Insurance Co.*, (CA 2, 1942) 130 F. 2d 149.

3. Assuming *arguendo* that appellee once had possession of the obligation owed to the bankrupt through the medium of its service of a notice of levy, appellee relinquished that possession prior to the bankruptcy action. The obligor had resisted payment of the obligation to both appellee and appellant. Appellee did nothing when its levy was ignored; appellant pursued his remedies to recover payment of the \$2,309.49 for the benefit of the bankruptcy estate. Appellee did not object when appellant asserted dominion over the obligation and reduced it to the possession of the bankruptcy court. *Henkin v. United States*, (CA 2, 1956) 229 F. 2d 895. Nor did appellee take any action to preserve its rights by stipulation or otherwise. Its action herein was tantamount to a relinquishment of any right to possession it may once have obtained. *Goggin v. Division of Labor Law Enforcement*, (1949) 336 U.S. 118, 69 S.Ct. 469.

4. By its express terms, Section 67c of the Bankruptcy Act (11 U.S.C.A., Sec. 107c) distinguishes between a "levy" on property and "possession" of the property. One clause of that subsection permits a lien on personal property to be perfected if "accompanied by possession" or if accompanied by a "levy". Because Congress expressly differentiated between "levy" and "possession" in one part of the subsection, it cannot be held that "levy" means the same as "possession" in another part of the same subsection. Hence any claim that appellee's "levy" was tantamount to "possession" must fail for the reason that such a construction of the statute is contrary to the manifest intention of Congress.

ARGUMENT.**I. A STATUTORY LIENHOLDER MUST HAVE ACTUAL POSSESSION OF PERSONAL PROPERTY IN ORDER TO CLAIM IMMUNITY FROM THE SUBORDINATION CLAUSE OF SECTION 67c OF THE BANKRUPTCY ACT.****A. Introduction.**

The statement of points set out in the Transcript of Record herein (R. 30-32) presents several facets of one underlying problem, i.e., the effect of service of a notice of levy upon an obligor of a delinquent taxpayer. This basic problem is not one that is susceptible of easy solution nor is it one that can be resolved by a superficial analysis of existing precedent. It presents a difficult question of statutory analysis and construction that must be faced with all of the factors of conflicting policy kept firmly in mind. And the adjudication of the problem presented by this case on appeal is one that will have far-reaching effects. What is decided here will govern not only this case but also the practices to be followed in many areas in which the bankruptcy law is administered. The precedent set here will decide not only the relations between the Internal Revenue Service of the United States and the bankruptcy court, but it will also affect the conduct of wage earners, of trade creditors and of others who supply the sinews of finance to private business in our economic system. These collateral effects must not be minimized; their importance far outweighs the settlement of this particular legal controversy now on appeal to this Court.

This controversy is one of first impression in this Court. It is not, however, new to the lower federal courts in this Circuit. In the case of *In re Milo O. Frank*, (S.D.

Cal., 1955) 55-2 U.S.T.C. ¶ 9772,¹ the court held for the trustee in bankruptcy against appellee on the same contentions as it is making herein. In the present case, the court below reached the opposite conclusion.

B. What Is a Notice of Levy?

In the present case, the District Director of Internal Revenue served a Notice of Levy upon Utility Trailer Sales Company of San Francisco on March 9, 1954, demanding payment of \$18,457.57 of taxes owed by Charles Manfre Transportation Co. A copy of the Notice of Levy, U. S. Treasury Department Form 668-A, is set out on pages 22-23 of the Transcript of Record. The Notice of Levy stated that

“... all property, rights to property, moneys, credits and/or bank repositis now in your possession and belonging to the aforesaid taxpayer and all sums of money owing from you to the said taxpayer are hereby seized and levied upon for the payment of the aforesaid tax, together with penalties and interest, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth above from the amount now owing from you to the said taxpayer, or for such lesser sum as you may be indebted to him ...”

Basically a notice of levy is nothing more than a notice of tax due and a demand for payment over. It is a request that the person then in possession of property belonging to the delinquent taxpayer turn it over to the government. A notice of levy can result in the transfer

¹Not officially reported, but bearing the number 59,574-P.T., In Bankruptcy in the Federal District Court for the Southern District of California.

of possession of the property to the government, but only if the person having dominion and control over the property actually complies with the notice. In itself, a notice of levy accomplishes nothing save to place the party holding the property on notice of the government's demand.

This analysis of the language on the face of the notice of levy form is consistent with the statutes empowering the Director to make levies on third parties. Section 3710(a), I.R.C. 1939² provides that

“And person in possession of property, or rights to property, subject to distraint, upon which a levy has been made, shall, upon demand by the collector or deputy collector making such levy, surrender such property or rights to such collector or deputy, unless such property or right is, at the time of such demand, subject to an attachment or execution under any judicial process.”

The statute authorizing levies implicitly recognizes the possibility that the third party so in possession of property may refuse or fail to surrender possession of the property as demanded under a notice of levy. It therefore provides a penalty for such refusal or failure. Thus in Section 3710(b), I.R.C. 1939,

“Any person who fails or refuses to so surrender any of such property or rights shall be liable in his own person and estate to the United States in a sum equal to the value of the *property or rights not so surrendered . . .*” (Emphasis added.)

²Although this levy was served in 1954, its effect must be judged under the 1939 Code. The equivalent section (Section 6332) of the 1954 Code did not become effective until January 1, 1955. Section 7851(a)(6)(B), I.R.C. 1954.

Obviously, if the notice of levy itself gave the government possession of the property or rights (as asserted on the face of the notice of levy form, *supra*), Section 3710(b) would be meaningless. No cause of action could accrue if service of the levy notice alone placed the government in possession of the property; Section 3710(b) becomes operative only in the case of a person who fails to surrender the property to the government as demanded. If the law presumed a surrender to the government by the mere service of the notice of levy, the government could not be heard to complain that its notice was disobeyed and that possession was not delivered up.

Consequently, we must conclude that Section 3710 itself contemplates the possibility that the property will be retained in the possession of the third party. That is why the Director is given a remedy under subsection (b). Nor is a personal action under Section 3710(b) the Director's only remedy. The Code provides him with another alternative to use against a recalcitrant person who refuses to deliver up property on demand under Section 3710. For example, the Director is empowered to file an action on behalf of the government to foreclose its lien upon the property itself. Section 3678, I.R.C. 1939.³

³"In any case where there has been a refusal or neglect to pay any tax, and it has become necessary to seize and sell property and rights to property, whether real or personal, to satisfy the same, whether distraint proceedings have been commenced or not, the Attorney General at the request of the Commissioner may direct a civil action to be filed, in a district court of the United States, to enforce the lien of the United States for tax upon any property and rights to property, whether real or personal, or to subject any such property and rights to property owned by the delinquent, or in which he has any right, title,

In summary, a notice of levy is nothing but a demand for possession. *Givan v. Cripe*, (CA 7, 1951) 187 F. 2d 225, 228; *United States v. O'Dell*, (CA 6, 1947) 160 F. 2d 304, 307. A notice of levy is not a self-executing instrument; of itself, a notice of levy merely creates a cause of action in favor of the United States. Section 3710(a), (b), I.R.C. 1939. In order to obtain possession of the property or rights, either the person holding it must surrender possession to the government or the government must commence a proceeding *in rem* against the property or rights to property or *in personam* against the person who failed to deliver the property.

C. Requirement of Possession under Section 67c of the Bankruptcy Act.

In the administration of estates in bankruptcy, lien claimants are generally entitled to a preferred position as to the assets on which they have a lien. For example, a mortgagee of real property is entitled to have his mortgage satisfied out of the property before any equity is turned over to the bankruptcy court for administration. But lienors claiming liens against personal property must meet a further test before they are entitled to take the lien property free of bankruptcy administration; in the case of a taxing agency, such as appellee, the lienor must show that it had acquired possession of the personal property subject to the lien. If its lien were not reinforced by possession of the property, Section 67c of the Bankruptcy Act (11 U.S.C.A. Sec. 107c) would require the taxing agency, including appellee, to take a subordinate position or interest, to the payment of such tax." (Section 3678(a), I.R.C. 1939.

tion to preferred wage claims and to costs and expenses of administration.⁴

“Where not enforced by sale before the filing of a petition initiating a proceeding under this title . . . statutory liens, including *liens for taxes* or debts *owing to the United States* or to any State or any subdivision thereof, *on personal property not accompanied by possession* of such property . . . *shall be postponed in payment* to the debts specified in clauses (1)⁵ and (2)⁶ of subdivision (a) of Section 104 of this title.” (Emphasis added) Section 67c of the Bankruptcy Act, 11 U.S.C.A. Sec. 107c.

Was appellee’s lien “accompanied by possession” of the intangible property held by Utility Trailer Sales? Certainly what appellee did in the present case does not

⁴If appellee had sold the personal property here in question or had made collection prior to bankruptcy, it would also have established its right to retain the proceeds outside the administration of the bankruptcy court. Section 67c, *supra*. This alternative is not in question in the present proceeding, because appellee did not follow up its notice of levy with any further proceedings looking toward a sale of the obligation owing to the bankrupt-taxpayer.

⁵Clause (1) debts are “the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition,” including “the reasonable costs and expenses of (recovering) for the benefit of the estate of the bankrupt . . . property of the bankrupt, transferred or concealed by him either before or after the filing of the petition . . .” Section 64a(1) of the Bankruptcy Act (11 U.S.C.A. Sec. 104a(1)).

⁶Clause (2) debts are “wages not exceeding \$600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt.” Section 64a(2) of the Bankruptcy Act (11 U.S.C.A. Sec. 104a (2)). Amended by Act of July 30, 1956, Sec. 1, Public Law 840, 84th Congress, to include “commissions” as well as “wages.” The amendment is not material herein.

measure up to the requirements of possession demanded of lien holders in other cases that have arisen under Section 67c of the Bankruptcy Act. For example, in *Goggin v. Division of Labor Law Enforcement*, (1949) 336 U.S. 118, 127, 69 S.Ct. 469, 474, the United States prevailed under Section 67c because it had taken *actual* possession of the bankrupt-taxpayer's personalty prior to the filing of the bankruptcy petition.⁷ The same was true in *United States v. Sands*, (CA 2, 1949) 174 F. 2d 384, 386, another case in which the United States prevailed. In the *Sands* case, the Collector had actually seized the personal property of the bankrupt taxpayer and had removed these assets to his office prior to the bankruptcy proceeding. Accordingly, the federal tax lien was "accompanied by possession" within the meaning of Section 67c. To the same effect are *Henkin v. United States*, (CA 2, 1956) 229 F. 2d 895, and *Davis v. City of New York*, (CA 2, 1941) 119 F. 2d 559.

The theory of these decisions, in which the government prevailed, is consistent with both the meaning and the purpose of the statute. By taking actual possession of the taxpayer's personalty, appellee placed everyone who dealt with the taxpayer on notice of its claim of lien against the property. No one, whether wage earners or trade creditors, could be misled by the amount of the taxpayer's property or by the status of the government's claim therein. And this was the purpose for which Sec-

⁷The facts, as recited by Justice Burton for a unanimous Court, show that the Collector had not only taken actual possession of the personal property, but also had attempted two sales of the property prior to his negotiations with the trustee in bankruptcy. 336 U.S. 118 at 122, 69 S.Ct. 469 at 471.

tion 67c was introduced into the Bankruptcy Act. These provisions were first considered by Congress in 1936. In an explanatory note to the provision that later became Section 67c, it was stated,

“It is significant that in recent years state legislatures have been enacting special legislation in favor of tax claims, public debts, and a variety of private claims. Statistics in the bankruptcy cases show that the effective administration of the bankruptcy law has seriously suffered therefrom. Such claims, particularly tax liens, often consume the entire estate, leaving nothing for the payment of the costs and expenses of administration incurred in reducing the assets to cash. In many such cases the tax liens represent an accumulation of delinquent items covering a long period of time, without any attempt on the part of tax collectors to enforce payment prior to the bankruptcy proceeding.

“There is therefore need for a provision to protect the administration costs and expenses; and similar considerations apply to wage claims. Accordingly we have selected, from among the priorities fixed by Section 64 (as revised), these particular items for protection. However, by reason of the historical development and the inherent differences existing in the incidents attaching to real and personal property, it would seem advisable to restrict the remedy thus provided to liens on personal property, where such liens have not been enforced by sale prior to bankruptcy.”⁸

⁸A discussion of the legislative background of this statute is found in footnote 8 of Justice Burton's opinion in *Goggin v. Division of Labor Law Enforcement*, (1949) 336 U.S. 118, 127, 69 S.Ct. 469, 474. See also Judge Hutcheson's concurring opinion in *City of New Orleans v. Harrell*, (CA 5, 1943) 134 F.2d 399, 401.

After the filing of this report and the above explanatory note, Congress amended the proposed Section 67c to except liens on personal property "accompanied by possession" as well; as those "enforced by sale prior to bankruptcy". This action of Congress in adding the "possession" clause after the bill had been reported "gives it special emphasis", according to Justice Burton, "and suggests its appropriate effect as a warning to other claimants that the property, so possessed, will not be available in the first instance for the administrative expenses and wage claims." *Goggin v. Division of Labor Law Enforcement*, (1949) 336 U.S. 118, 127, note 8, 69 S.Ct. 469, 474.

From this analysis of the legislative history, the Supreme Court concluded that

"The background of §67, sub. c suggests a conscious purpose to give a narrowly limited priority to administrative expenses and to certain wage claims, at least in instances disclosing accumulations of *unpaid taxes the priority of which wage earners had no good reason to suspect*, and which might absorb the entire estate of the bankrupt unless postponed by these provisions. The purpose of §67 in *requiring a public warning of the existence of an enforceable statutory lien for taxes* was served in the instant case not only by the steps taken to perfect the Government's lien but by the Collector's *seizure and actual possession* of the personal property of the taxpayer before the filing of the taxpayer's petition in bankruptcy." (Emphasis added.) 336 U.S. at 127-129, 69 S.Ct. at 474-475.

But appellee seeks to prevail in the present case by arguing that (1) the service of a notice of levy gave it

“constructive” or “legal” possession, and (2) “constructive” or “legal” possession is the equivalent of actual possession for the purpose of satisfying Section 67c. Whether or not service of a notice of levy gives appellee “constructive” possession (see Part II, *infra*), it is clear that “constructive” possession would not give the type of public warning demanded by Section 67c.

Under the facts of the present case, appellee took no action to warn creditors and wage earners of its claim to a possessory lien. It made no seizure of assets; it removed no personalty from the taxpayer's premises; nor did it even commence any suit against the holder of the taxpayer's obligation to entitle it to a *lis pendens* on that asset. It did nothing but cause to return unsatisfied a notice of levy served on an officer of Utility Trailer Sales. Certainly the service of a notice of levy upon a third party gives no public notice or warning to the creditors and wage earners of the taxpayer; these parties are kept in ignorance of the government's lien unless the government proceeds against the taxpayer itself. If public warning is the purpose to be served by Section 67c, then the requirements of “possession” cannot be met by obtaining “legal” or “constructive” possession. It was for this reason that the Court of Appeals for the Second Circuit reached different results in its two decisions of *Davis v. City of New York*, (CA 2, 1941) 119 F. 2d 559, and *City of New York v. Hall*, (CA 2, 1944) 139 F. 2d 935. In the *Davis* case, the City of New York prevailed over the trustee in bankruptcy on a tax lien claim by showing that it (1) had docketed a warrant for the delinquent tax with the county clerk, (2) had seized the

bankrupt's property prior to bankruptcy, and (3) had sold the property by tax sale after bankruptcy.

But in the *Hall* decision, the City of New York's lien for taxes was subordinated to claims of administration and wage claimants. All the city had done was to (1) docket the warrants for the delinquent tax with the county clerk, and (2) send two officers out to seize the bankrupt's personal property. These officers completed their seizure by posting notice of sale at 4:30 p.m. However, at 4:22 p.m. on the same day, the petition in bankruptcy was filed. Because the filing of the bankruptcy petition antedated the city's completion of its seizure, the Court of Appeals held for the trustee in bankruptcy. In analyzing the term "possession" as used in Section 67c, Judge Frank observed,

"The word 'possession' drips with ambiguity. It is not a single purpose word and must be contextually construed. That for some purposes, under some sections of the act, it may include 'constructive possession' gives us no answer to our question. We are convinced that Section 67, sub. c, meant something more. * * * The facts here are illustrative: the City's claims are for taxes which had accumulated for seven or eight years respectively. Notwithstanding the admonition of Section 67, sub. c, the City chose to slumber on its rights. Congress intended to penalize such somnolence.

"* * * Whether steps taken pursuant to State 'law' are sufficient to constitute 'possession' under 67, sub. c, is a question of Federal 'law'. *That conduct must adequately warn potential petitioning creditors of the existence of the lien.* The City's action did not satisfy that test." (Emphasis added.)

This conclusion of Judge Frank's has been approved by this Court of Appeals. In *Division of Labor Law Enforcement v. Goggin*, (CA 9, 1947) 165 F. 2d 155, 157,⁹ it was stated, "We agree with the Second Circuit in *City of New York v. Hall*, 139 F. 2d 935, in the holding that 'possession' as used in Section 67, sub. c, means actual possession, the purpose being to protect and give warning to creditors."¹⁰

D. Conclusion.

Certainly there is no inequity in rigorously applying Section 67c to appellee in the present case. Had appellee obtained actual possession of the bankrupt's property, or had the property been sold by appellee, appellee might equitably claim to be entitled to the entire amount of the sales proceeds free of the claims of the trustee for expenses of administration and of wage earners for wages earned immediately prior to bankruptcy. But here, where ap-

⁹Reversed in *Goggin v. Division of Labor Law Enforcement*, (1949) 336 U.S. 118, 69 S.Ct. 469, on another ground relating to the effect of a stipulation between the parties. In effect, the Supreme Court's stand on the requirement of actual possession paralleled that of this Court.

¹⁰The admonition of Section 67c to lienors that they must take actual possession prior to bankruptcy becomes the more important in view of this Court's later decision in *United States v. England*, (CA 9, 1955) 226 F.2d 205. There it was held that a federal tax lien is enforceable in bankruptcy against the trustee although it had not been filed for public record. We do not quarrel with this result, but we do point out that such a lien is completely secret and hidden from public scrutiny. Consequently it becomes all the more incumbent upon appellee, as the potential holder of such liens, to interfere publicly with the taxpayer's possession so that actual warning may be given to all those interested in his estate. And service of a notice on a third party, without action against the taxpayer, would not afford that all important public notice.

pellee did nothing to enforce its notice of levy, the same equity in its favor is not present. All of the costs and effort of reducing the property to possession and of converting the obligation of Utility Trailer Sales into cash were borne and made by the appellant.

This balancing of the equities between the parties was a factor in the adoption of Section 67c as part of the Bankruptcy Act in 1938. As it is pointed out in 4 *COLLIER ON BANKRUPTCY* (14th ed., 1942, Matthew Bender & Co.), § 67.27(1),

“The general rule that lienors should not have to bear the costs and expenses of a bankruptcy proceeding, which are the first items to be paid under §64a, has usually, however, been subject to the limited exception that where the lienor has invoked the aid of the bankruptcy court in enforcing his lien or where the bankruptcy court properly sells the property free of liens, the lienor is chargeable with his share of the direct and necessary expenses of preserving and realizing the security.”

Certainly no one, especially the lienor whose claim is paid in part or in full, could equitably attack this principle. He has had the benefit of the trustee's services and should pay for them. Section 67c, for the policy reasons discussed above, goes beyond the limits of this equitable principle to subordinate certain statutory liens on personal property to “provide a measure of much-needed protection, (1) for administrative costs and expenses in the interest of bankruptcy administration, and (2) for wage claims in the interest of protecting a weak but deserving economic class, against the ravages of certain accumulated liens on the bankrupt's property.” *COLLIER, op. cit.*

But in the present case, appellee seeks the benefit of appellant's effort and expenses in liquidating the bankrupt's claim against Utility Trailer Sales and also demands payment over of the *full* amount of the fund so created (R. 9). This is not proper. Appellee would be entitled to the fund only if it had been the party to liquidate the claim and to reduce the fund to possession. In that event appellee properly could have challenged the jurisdiction of the bankruptcy court (which it did not and could not do here) over the fund and could have retained the fund for application in full to its tax liens. *Henkin v. United States*, (CA 2, 1956) 229 F. 2d 895, 897; *In re Brokol Manufacturing Co.*, (CA 3, 1955) 221 F. 2d 640, 642. Here, however, appellee had to rely upon the services of appellant, the trustee, and upon the jurisdiction of the bankruptcy court over the fund in order to obtain anything for application to its lien claim. Had appellant not pursued Utility Trailer Sales to force a settlement payment of the bankrupt's claim, no fund would have been created against which appellee might later assert possessory rights. Section 67c was written for the purpose of penalizing inaction such as appellee's herein; administration of bankruptcy estates will be encouraged and strengthened only by awarding the avails to the party which actually enforces the bankrupt's inchoate rights.

II. SERVICE OF A NOTICE OF LEVY UPON AN OBLIGOR UNDER A CONTINGENT OBLIGATION NOT YET FIXED OR DETERMINATE IN AMOUNT IS INEFFECTIVE TO REACH THAT OBLIGATION.

When appellee served its notice of levy, the sum of \$2,309.49 was not in existence; no fund representing the \$2,309.49 came into existence until nineteen months¹¹ later when that sum was agreed to be paid over to appellant in settlement of the bankrupt's claim against Utility Trailer Sales. All that existed prior to the date of the compromise settlement was a right to recovery against Utility Trailer Sales for its action in repossessing the four trucks. This right could not be measured in money terms; the amount Utility Trailer Sales might be liable for was unfixed and indeterminate. No account had been stated between Utility Trailer Sales and the bankrupt. The claim, if any, had not been liquidated. As a matter of fact, at the time the levy was served (March 9, 1954), the trucks seized from the bankrupt still remained in the possession of Utility Trailer Sales. Until the trucks had been sold, no obligation pertaining to them could have accrued in favor of the bankrupt.

Whether a claim even existed against Utility Trailer Sales after the repossession was disputed. Utility Trailer Sales admitted liability neither to appellee nor to the bankrupt. A proceeding and a hearing before the referee in bankruptcy were required before Utility Trailer Sales agreed to pay anything even by way of settlement. Obviously, at the time the levy was served on it, any claim

¹¹The precise time interval between the date of the service of levy (March 9, 1954) and the date of the compromise settlement (October 24, 1955) was one year, seven months, and fifteen days (R. 4-5).

of the bankrupt against it was wholly speculative and contingent.

The levy procedure authorized by the Internal Revenue Code is not designed for cases of this sort. If the person being served has any defenses, or if any contingencies in payment may arise, the levy procedure offers him no opportunity to present these defenses. Hence the courts have held a levy by the Director to be unenforceable against contingent or unliquidated obligations.

For example, a levy by the United States upon a life insurance company to reach the cash surrender value of a policy owned by the taxpayer has been held unenforceable. *United States v. Metropolitan Life Insurance Co.*, (CA 2, 1942) 130 F. 2d 149; *United States v. Penn Mutual Life Insurance Co.*, (CA 3, 1942) 130 F. 2d 495; *United States v. Massachusetts Mutual Life Insurance Co.*, (CA 1, 1942) 127 F. 2d 880. The reasons underlying these decisions are twofold: (1) the levy procedure does not afford any opportunity for beneficiaries, assignees, and other parties who claim an interest in the policy to be heard; and (2) even in a situation in which the taxpayer is the exclusive owner, the policy itself must be surrendered by him before any fixed and determined obligation to pay over arises. In other words, the court's reluctance to countenance the use of the levy procedure against insurers is based upon their concern for the rights of others that may be injured if the United States relies solely upon its levy procedure for collection.¹² But these

¹²Congress was well aware of this limitation upon the use of the levy when it drafted the 1954 Code. It expanded Section 3710, I.R.C. 1939, to include the parenthetical phrase "or ob-

decisions do not mean the United States is remediless if the taxpayer's assets are life insurance equities. Its remedy is to enforce collection of the surrender values of the policy by bringing a suit to enforce or foreclose its tax lien upon the policy under Section 3678, I.R.C. 1939. Because the interests of all the parties—the insured, the insurer, the beneficiaries and any assignees—will be protected and represented in such an action, the courts have readily approved such suits while denying the government the right to proceed by levy. *Schwartz v. United States*, (CA 4, 1951) 191 F. 2d 618, 620; *United States v. Prudential Insurance Co.*, (E.D. Pa., 1944) 54 F. Supp. 664; *United States v. Trout*, (S.D. Cal., 1942) 46 F. Supp. 484.¹³

ligated with respect to" property or rights to property subject to levy. Section 6332(a), I.R.C. 1954. But in broadening the language of these distraint sections, the Senate Finance Committee stated, "This section (defining property exempt from levy) is not intended to make any change with respect to the status of life insurance policies insofar as levy thereon is concerned." (Sen. Rep. No. 1622 (83d Cong., 2d Sess., 1954), p. 578. See also H. Rep. No. 1337 (83d Cong., 2d Sess., 1954), p A-409.

¹³Compare this analysis with the discussion in *United States v. Stock Yards Bank of Louisville*, (CA 6, 1956) 231 F. 2d 628, 631, as follows: "It should be pointed out, however, that distraint is a rough and ready remedy. This short cut form of self-help developed by the common law has been available to the government in pursuit of delinquent taxpayers since the eighteenth century. (citation omitted) Where the value and nature of the taxpayer's rights are not in question, distraint is no doubt a useful tool in the effective enforcement of the Internal Revenue laws. But it is a blunt instrument, ill-adapted to carve out property interests where their nature and extent are unclear.

"There is available to the government an alternative remedy well-designed to resolve the issues in the present case. Under Section 3678 of the Internal Revenue Code of 1939, the United States can bring suit against the bank to enforce a lien on the bonds and name both the taxpayer and his wife co-defend-

The same considerations are present in this case on appeal. At the time of the levy, Utility Trailer Sales admitted no liability. So long as the obligation incurred by Utility Trailer Sales remained indeterminate and uncertain, summary procedure by way of notice of levy was improper. Utility Trailer Sales, the bankrupt, and the trustee in bankruptcy, appellant herein, would be afforded no opportunity to have their rights determined. Consequently, the levy would have been unenforceable had appellee actually attempted to follow it up. Perhaps that was the reason appellee never attempted to enforce the levy.

Appellee's levy was unenforceable for another but related reason. Generally, it has been held that a levy "speaks only as of the date it is served." An amount becoming due and payable to the taxpayer after the date of service of a notice of levy is not reached by the levy. In this event, the United States must serve a second levy to reach the obligations maturing at a later date.

For example, only *accrued* wages or salary of an employee are subject to levy. A levy is not a continuing order that once served reaches wages or salary payments becoming due after the date of service. *United States v. Long Island Drug Co.*, (CA 2, 1940) 115 F. 2d 983, 986; *United States v. Newhard*, (W.D. Pa., 1955) 128 F. Supp. 805, 809; I.T. 1557, II-1 Cum. Bul. 172; Rev. Rul. 55-227, 55-1 Cum. Bul. 551.¹⁴

ants. In such a proceeding the extent of the taxpayer's interest in the bonds can be finally adjudicated, and the rights of all the parties fully protected."

¹⁴Again Congress had this limitation upon the scope and reach of a levy in mind when it enacted the 1954 Code. In Section

Correspondingly, a levy served on a bank reaches only the depositor's account as of the time the notice is served; it does not reach amounts deposited after the date of the levy. *United States v. Guaranty Bank & Trust Co.*, (E.D. N.C., 1944) 56 F. Supp. 470, 472.

The same rule applies in the present case. Certainly appellant, the trustee in bankruptcy, ought not to be required to labor under greater disabilities than those applicable to taxpayers and holders of taxpayer's properties in the absence of bankruptcy proceedings. If the levy would be had invalid and unenforceable absent the bankruptcy proceedings, it certainly ought not to be treated as vesting "possession" in appellee for the purpose of determining the priority of appellee's lien in a bankruptcy proceeding. An invalid levy not actually complied with cannot transfer "possession" of the obligation to appellee, if for no other reason than the fact that the party served is not required to deliver it up to appellee.

To require appellee to meet the same strict rules in bankruptcy proceedings as it must meet out of them will work no hardship on appellee. If the obligation, as in the present case, is contingent and unaccrued prior to bankruptcy, appellee will be able to meet the test of

6331, I.R.C. 1954, it expressly provided the same limitation upon its new authorization to levy upon wages and salaries of governmental employees. Section 6331(a) reads, in part, as follows: "Levy may be made upon the *accrued* salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia . . ." (Emphasis added.) In explanation of this section, the Senate Finance Committee said, "The provisions as to levy on salaries of Government employees are the same as those applicable for any other delinquent taxpayer." Sen. Rep. No. 1622 (83d Cong., 2d Sess., 1954) p. 577.

Section 67c by doing one of two things: (1) appellee may sell any rights it may have to the obligation at a public sale; or (2) appellee may bring an action to foreclose its lien against the obligation prior to bankruptcy. Neither alternative places an insuperable burden on appellee, but both alternatives are in the spirit of Section 67c which emphasizes the necessity of public notice and warning. If appellee does not take these two steps, but relies on any lesser procedure as in this appeal, its claim of lien should be subordinated under Section 67c.

III. FAILURE TO ENFORCE A LEVY AND FAILURE TO CONTEST THE ASSERTION OF POSSESSION BY THE TRUSTEE IN BANKRUPTCY CONSTITUTE A RELINQUISHMENT OF POSSESSION.

After having its notice of levy on Utility Trailer Sales returned unsatisfied, appellee did nothing. It made no attempt to enforce the notice of levy by the statutory procedure available to it, nor did it undertake to initiate any other of its statutory methods for collecting the obligation owed the bankrupt. Had "possession" of this obligation been deemed to have been transferred to appellee by virtue of its service of a notice of levy upon Utility Trailer Sales, its subsequent conduct is tantamount to a relinquishment of possession.

Under Section 67c of the Bankruptcy Act, appellee must take and hold possession of the personal property under its lien in order to claim the property free of the subordination clauses. The date on which possession is judged is not the date of appellee's seizure; it is the date

on which the petition in bankruptcy is filed. *Goggin v. Division of Labor Law Enforcement*, (1949) 336 U.S. 118, 69 S.Ct. 469. In the *Goggin* case, the United States had obtained actual possession of the bankrupt's personal property by a seizure prior to bankruptcy. However, after the bankruptcy proceeding had commenced, the United States, under a stipulation preserving its rights, released these assets to the possession of the trustee in bankruptcy in order to expedite their sale. The trustee in bankruptcy sold the assets and attempted to subordinate the government's claim of lien to expenses of administration and preferred wage claims. This Court supported the trustee. Because the United States had released the custody of the assets to the bankruptcy court, it had relinquished its claim to a lien on personal property "accompanied by possession". *Division of Labor Law Enforcement v. Goggin*, (CA 9, 1947) 165 F. 2d 155.

It was on this point that the Supreme Court reversed the decision of this Court. All parties conceded that the United States had had actual possession of the bankrupt's chattels at the time of bankruptcy. The government's later relinquishment of possession to the trustee did not affect its rights as a possessory lienor because that relinquishment was pursuant to a stipulation reserving the rights of the parties. The only way the trustee in bankruptcy could obtain dominion over the seized property was by way of a stipulated agreement between himself and the government. Without first obtaining the consent of the government, the trustee would have been unable to take over the property for sale in the bankruptcy proceeding.

Obviously, none of these circumstances exist in the present appeal. Appellee was exercising no dominion or control over the obligation of Utility Trailer Sales at the time the petition in bankruptcy was filed. And subsequently when appellant cited Utility Trailer Sales into the bankruptcy court in a proceeding to determine the nature and extent of the latter's obligation to the bankrupt, appellee did not object. It did not protest the bankruptcy court's jurisdiction to interfere with property in its possession, as it would have done had it had actual possession of the obligation. *In re Brokol Manufacturing Co.*, (CA 3, 1955) 221 F. 2d 640, 642; *Henkin v. United States*, (CA 2, 1956) 229 F. 2d 895; *City and County of Denver v. Warner*, (CA 10, 1948) 169 F. 2d 508.

In both the *Brokol* and the *Henkin* decisions, *supra*, the United States had seized the assets of the bankrupt prior to bankruptcy.¹⁵

After the seizure by the government, the trustee in bankruptcy attempted to interfere with the government's possession of the assets by a proceeding in the bankruptcy court. To this proceeding the United States objected, claiming the bankruptcy court lacked jurisdiction to determine the validity of its possession. On appeal, this plea to the jurisdiction made by the United States was sustained on the authority of *Cline v. Kaplan*, (1944) 323

¹⁵Included among the assets in the *Brokol* case were the bankrupt's accounts receivable; these intangible assets had been reduced to the government's possession by an actual seizure of the accounts receivable books from the bankrupt, followed by notice to the account debtors to pay to the United States. *In re Brokol Manufacturing Co.*, (D.C. N.J., 1953) 109 F.Supp. 562, 564, *aff'd* (CA 3, 1955) 221 F. 2d 640.

U.S. 97, 65 S.Ct. 155. *In re Brokol Manufacturing Co.*, supra; *Henkin v. United States*, supra.

In the present appeal, appellee made no objection to the jurisdiction of the bankruptcy court;¹⁶ undoubtedly appellee found it impossible to question the jurisdiction of the bankruptcy court because appellee had taken actual possession of the obligation by receiving the settlement payment from Utility Trailer Sales. The only way appellee could assert any right to this payment was to come into the bankruptcy court and plead its rights.

By filing its response in which it invoked the assistance of the bankruptcy court, appellee necessarily recognized the possession of the bankruptcy court, through appellant, over the money. Appellee had played no part whatsoever in obtaining this sum of money; hence there was no need to obtain its consent to administer the settlement fund, as in the *Goggin* case, supra. No stipulation preserving appellee's rights to possession was entered into because appellee itself had long before voluntarily relinquished any rights it might have had. Appellee not only lacked possession of the money but also lacked the benefit of having an agreement preserving its rights. If the *Goggin* case was correctly decided, the present case must go the other way. In *Goggin* it was necessary for the trustee to first deal with the United States in order to obtain the

¹⁶Appellee's response to appellant's original order to show cause raised three points: (1) that appellee's claim for taxes had become a lien against the bankrupt's property; (2) that because appellee's lien was "accompanied by possession", appellant had no interest in the obligation of Utility Trailer Sales; and (3) that the bankruptcy court lacked jurisdiction to determine whether or not Utility Trailer Sales was liable to appellee under Section 3710, I.R.C. 1939, for "noncompliance with the levy" (R. 7-9).

property for administration; in the present case, appellee's inaction and failure to enforce its levy permitted appellant to obtain the property for administration in the bankruptcy estate.

IV. SERVICE OF A NOTICE OF LEVY UPON AN OBLIGOR DOES NOT REDUCE THE OBLIGATION TO POSSESSION OF THE UNITED STATES WITHIN MEANING OF SECTION 67c OF THE BANKRUPTCY ACT.

A. Introduction.

The fact that clause (1) of Section 67c speaks in terms of "possession" does not confine its application to tangible personal property.¹⁷ *In re Milo O. Frank*, (S.D. Cal., 1955) 55-2 U.S.T.C. ¶ 9772. And compare *In re Brokol Manufacturing Co.*, (D.C. N.J., 1953) 109 F.Supp. 562, aff'd (CA 3, 1955) 221 F. 2d 640. Obviously many types of intangible property are just as susceptible of being "possessed" as tangible property. In the *Brokol Manufacturing Co.* case, for example, the government had seized the bankrupt's accounts receivable and was making collection of the accounts from the bankrupt's debtors. Compare also the procedure followed by the Collector in *In re Mutual Carrier Co., Inc.*, (D.C. Conn., 1952) 52-2 U.S.T.C. ¶ 9507. There accounts receivable of the bank-

¹⁷Whether the Fourth Circuit intended to so limit Section 67c in *United States v. Eiland*, (CA 4, 1955) 223 U.S. 118, 123, is not clear from the language used in the opinion. The Court said, in reference to Section 67c, "That section also manifestly has reference to tangible property which can be taken into possession, not to indebtedness which has been levied upon with notice to the debtor so that it is to all intents and purposes assigned to the United States." Further on, the Court states, "If the statute be construed to apply to indebtedness . . ."

rupt were taken into possession by an actual seizure of the books of the account, followed by a notice to the trade debtor to pay the seized accounts to the Collector.

Many other types of intangible property can be reduced to actual possession. Stock certificates, bonds, all types of negotiable instruments and all other obligations which are evidenced by a document or by a writing¹⁸ are all capable of being possessed within the meaning of Section 67c. In such cases, in which the intangible is reduced to a writing, it would be improper for the government to attempt to obtain any rights over the property by merely levying upon the obligor without also seizing the evidence of the intangible as well.¹⁹

Certainly in the case of evidence of indebtedness and other documentary intangible property, Section 67c can be enforced according to its literal terms to require the government to take actual possession of the property prior to bankruptcy. Where the government does anything less, its lien should be subordinated. For example,

¹⁸Section 3690. I.R.C. 1939, which authorizes the Collector to proceed by distraint against a delinquent taxpayer, specifically enumerates a number of classes of intangible property. The Collector is authorized to collect the delinquent taxes by distraint and sale "of the goods, chattels, or effects, *including stocks, securities, bank accounts, and evidences of debt*, of the person delinquent as aforesaid." (Emphasis added.)

¹⁹If the Collector failed to seize the documentary evidence itself, the taxpayer holder of a "security" would have the power to divest the government of its lien thereon by transferring the security to a purchaser, pledgee or mortgagee who takes his interest for value without actual notice or knowledge of the lien. (Section 3672(b)(1), I.R.C. 1939. "Security" is defined for this purpose as including "any bond, debenture, note or certificate, or other evidence of indebtedness, issue by any corporation . . . negotiable instrument; or money." Section 3672 (b)(2), I.R.C. (1939).

in *In re Milo O. Frank*, (S.D. Cal., 1955) 55-2 U.S.T.C. ¶9772, the government had a lien on shares of stock owned by the bankrupt. But all it did prior to bankruptcy was serve a notice of levy upon a bailee of the stock certificates. For the lack of an actual seizure prior to bankruptcy, the lien of the government was subordinated under Section 67c.

And this interpretation is in accord with sound policy. To eliminate intangible personal property from the reach of Section 67c would be to place such property on a par with real property. Real property was specifically eliminated from the subordination clauses by Congress for the reason that creditors and others do not rely upon the facts of possession as demonstrating ownership. Record title is what counts. Hence there is no need to require that a statutory lien on real property be accompanied by possession in order to give adequate warning to creditors and wage earners.

But record title plays even less importance in the case of intangible personal property than in the case of tangibles. If possession is to be required of tangible personalty, certainly the equivalent, or more, is to be required of intangibles. Any other conclusion would require a trustee to distribute tangible personalty to one set of claimants and intangibles to another without any distinction being drawn in the statute for such differences in treatment. Furthermore, if the term "personal property" in Section 67c does not include intangibles, then Section 70f of the Bankruptcy Act (11 U.S.C.A. Sec. 110(f)), which is *in pari materia*, would not authorize the trustee in bankruptcy to sell intangible property because

it authorizes the sale of only "real and personal property". Naturally no such distinction has been drawn under Section 70f. See 4 *COLLIER ON BANKRUPTCY* pp. 1556-1558; Feigenbaum, J. Walter, "The Bankruptcy Triangle: Creditor-Debtor-Commissioner," *TAXES, THE TAX MAGAZINE*, June, 1952 issue, 448 at 453, note 25.²⁰

Consequently, we must assume that all the Court of Appeals of the Fourth Circuit meant to hold in *United States v. Eiland*, supra, was that in its opinion the "possession" requirement of Section 67c was met by the government's action in that case. We do not believe the *Eiland* conclusion is applicable to the present case for the reasons discussed below.

B. "Possession" of an Obligation.

Under the mandate of Section 67c, appellee must take possession of the lienied personal property if it wishes to hold the property free of bankruptcy administration. The fact that appellee may encounter difficulty in reducing the property to possession, because of its intangible nature, does not excuse appellee from meeting the requirements of the statute. To water down the statutory requirement of "possession" in the case of intangible property, as appellee has argued below, is to destroy the very

²⁰Any other conclusion would make clause (1) of Section 67c inconsistent with clause (2) of the same section. Clause (2) applies to liens on "personal property not accompanied by possession of, or by levy upon or by sequestration or distraint of, such property." Obviously Congress intended to subject liens on intangible personal property to the subordination provisions of clause (2) because it expressly added the execution processes of levy, distraint and sequestration which are capable of being applied to intangible as well as tangible personal property.

purpose of the statute. Possession by a taxing agency, including appellee, must be so open and notorious that public warning is given to all who deal with the bankrupt. Any concept of "possession" which leaves the property or the obligation in the hands of the bankrupt or in the hands of third parties is not sufficient to carry out the legislative purpose of providing public notice and warning. For this reason the courts have said that "actual possession" is necessary to meet the test of Section 67c. *Goggin v. Division of Labor Law Enforcement*, (1949) 336 U.S. 118, 69 S.Ct. 469; *United States v. Sands*, (CA 2, 1949) 174 F. 2d 384, 386. "Constructive" or "legal" possession is not sufficient to satisfy Section 67c. *City of New York v. Hall*, (CA 2, 1944) 139 F. 2d 935; *Division of Labor Law Enforcement v. Goggin*, (CA 9, 1947) 165 F. 2d 155, 157, rev'd on other grounds, (1949) 336 U.S. 118, 69 S.Ct. 469.

In *United States v. Eiland*, (CA 4, 1955) 223 F. 2d 118, the Fourth Circuit took the opposite approach. There appellee had served a levy upon a coal company for taxes owed by the bankrupt. The coal company owed the bankrupt \$1,885.54 at the time the levy was served. Three days after service of the levy, the bankrupt filed its petition in bankruptcy. On these facts, the Fourth Circuit held that appellee had taken possession of the indebtedness under its lien for taxes and was entitled to have the entire indebtedness, up to the amount of the levy, paid to it free of claims of administration and wage claims. In other words, appellee's lien on the indebtedness was "accompanied by possession" within the meaning of Section 67c of the Bankruptcy Act.

This decision, we believe, is wrong. But whether it is wrong or not, it does not govern the present case. In *Eiland*, the levy was proper; it was made upon a presently liquidated and accrued obligation. In the present appeal, the levy was improper; it was ineffectual to reach a contingent, unliquidated and unaccrued obligation owed to the bankrupt. As we pointed out above in Part II hereof, a levy is not the proper remedy for appellee to use in asserting any rights it may have against a contingent claim. In order to protect the interests of the third party debtor and to assure that his defenses to the claim of liability are heard, appellee must proceed by suit to foreclose its lien or to enforce its notice of levy. Certainly the debtor should not be required to pay until it is found that he actually owes the taxpayer some money.²¹

Another important difference between *Eiland* and the present appeal is found in the time that elapsed between the service of the levy and the filing of bankruptcy. In *Eiland*, it was but three days; in the present appeal, it was three months (March 9, 1954 to June 4, 1954, R. 4-5). At first blush this may appear to be an unimportant distinction. But the decision in *Eiland* rests in part upon the shortness of this time interval. "The United States had done everything that it could to assert dominion over the indebtedness . . ." 223 F. 2d 118 at 123. Certainly the same statement could not be made in the present case. Here appellee slept on its rights during the three-month period prior to bankruptcy. It made no attempt

²¹Until it is determined or conceded that the third party debtor is actually in debt to the taxpayer, no action will lie under Section 3710, I.R.C. 1939 to enforce the levy. *United States v. Metropolitan Life Insurance Co.*, (CA 2, 1942) 130 F. 2d 149.

to enforce its levy by filing suit under Section 3710, I.R.C. 1939. Nor did it attempt to foreclose its lien on the contingent liability as authorized under Section 3678, I.R.C. 1939. Because of the much greater interval of time between the service of levy and the filing of bankruptcy in the present case, it would be unreasonable not to require appellee to take these further steps in order "to assert dominion" over the bankrupt's contingent claim.

C. A Levy as "Possession" under Section 67c.

Independently of these other considerations, a mere notice of levy cannot, as a matter of accurate statutory construction, be the equivalent of "possession" as required by Section 67c of the Bankruptcy Act. If *Eiland v. United States*, (CA 4, 1955) 223 F. 2d 118, meant to hold to the contrary, it is wrong.

The reason for making this flat assertion lies in the language of Section 67c itself. That subsection of the Bankruptcy Act provides for the subordination of three classes of liens on the personal property of the bankrupt. The first class, found in clause (1) of the subsection, covers all statutory liens, including tax liens of the United States or of the states.²² The second class, also found in clause (1), comprises liens of distress for rent, whether statutory or not.²³ The third class, found in

²²The precise statutory language is as follows: "statutory liens, including liens for taxes or debts owing to the United States or to any State or any subdivision thereof, on personal property not accompanied by possession of such property . . ."

²³"liens, whether statutory or not, of distress for rent . . ."

clause (2) of Section 67c, consists of statutory liens for debts owing to private persons and others.²⁴

Each of these three classes of liens is subordinated under Section 67c. Clause (1) liens (statutory liens for governmental obligations and liens of distress for rent) are expressly postponed in payment to costs of administration and wage claims. Clause (2) liens (private statutory liens) are more than postponed in payment; they are invalidated in full as against the trustee in bankruptcy.

Because clause (2) liens are treated much more harshly in bankruptcy than clause (1) liens, the circumstances under which Section 67c comes into play are much more rigorous under clause (2) than under clause (1). In other words, a clause (2) lienor is provided with several alternative methods under which he may perfect his statutory lien to protect it against the harsher invalidation provisions of Section 67c. A private statutory lienor under clause (2) may protect his lien on personal property by taking action under any one of the following four alternatives prior to bankruptcy:

- (1) Accompany his lien by possession
- (2) Levy upon the property
- (3) Sequester the property
- (4) Distrain the property²⁵

²⁴“statutory liens created or recognized by the laws of any State for debts owing to any person, including any State or any subdivision thereof, on personal property . . .”

²⁵The precise statutory language is as follows: “statutory liens . . . on personal property *not accompanied by possession of, or by levy upon or by sequestration or distraint* of such property, shall not be valid against the trustee . . .” (Emphasis added.)

Clearly Congress could not have intended to equate "possession" with "levy", because it spoke of them as different things. If the concept of possession could be met by a mere levy, the insertion of the phrase "by levy upon" in clause (2) of Section 67c would be mere surplusage. "Levy upon" is expressly made an alternative test to "accompanied by possession".²⁶ Implicitly then "levy upon" must mean something different than "accompanied by possession".

The final conclusion follows necessarily from this preliminary conclusion. If "levy upon" is a concept different from "accompanied by possession" in clause (2) of Section 67c, it must be a different concept than "accompanied by possession" in clause (1) of the same section.²⁷ Any other conclusion inescapably implies that Congress did not know what it was doing when it chose the two forms of expression and used them in the same statute.

The *Eiland* opinion did not deal with or even discuss this problem of statutory construction. Clause (2) and its bearing on the interpretation of clause (1) were ignored by the Fourth Circuit. Undoubtedly the point was not called to that court's attention as it was reaching its decision. The point not having been considered by the court, its decision cannot be accepted as authoritative precedent.

²⁶The two requirements are coupled together by the disjunctive connective "or".

²⁷The two clauses are not only found in the same subsection of the Bankruptcy Act but they deal with similar problems, i.e., the recognition of statutory liens on personal property in proceedings under the Bankruptcy Act. Clearly the phrases "accompanied by possession" are *in pari materia* and must be construed alike in the two clauses.

Certainly the *Eiland* case should not be read as interpreting the phrase “accompanied by possession” as meaning “levy upon”.²⁸

On the basis of the statutory language itself, appellee’s mere levy made on Utility Trailer Sales in the present case cannot be the equivalent of reducing its lien to “possession”. Being the holder of a lien on personal property unaccompanied by possession, appellee’s claim must be subordinated to costs of administration and preferred wage claims. For this reason, the order appealed from must be reversed.

D. Effect of a Reversal Herein on Bankruptcy Administration.

In *Eiland v. United States*, (CA 4, 1955) 223 F. 2d 118, the Fourth Circuit indicated great concern for the problem the government faced in attempting to reduce intangible property to “possession” prior to bankruptcy in order to prevent the subordination of its lien on personal property. In manifesting its concern, it made what appears from the published opinion to be a faulty construction of the statute.²⁹ Its reasoning appeared to be the following:

²⁸What, if any, steps the United States took in addition to its levy upon the obligation of the bankrupt’s debtor does not appear from the reported opinions of either the district court or the Court of Appeals in the *Eiland* case.

²⁹Whether or not the United States took any additional steps to reduce its lien to possession, such as making an actual seizure of the account receivable from the bankrupt, does not appear. Compare, for example, the procedure followed by the Collector in *In re Mutual Carrier Co.*, (D.C. Conn., 1952) 52-2 U.S.T.C. ¶ 9507. There the Collector (1) seized the books and records of the bankrupt prior to bankruptcy; (2) notified the account debtors of this seizure; and (3) directed the debtors to make payment of the accounts directly to the Collector.

(1) The United States must reduce its lien to possession.

(2) The United States had served a levy.

(3) Because it is difficult to comprehend taking possession of an intangible obligation, the levy must be equated with taking possession in order to prevent the tax lien from being subordinated.

It is the third step of this syllogism with which we quarrel. Under Section 67c, a lien on personal property is entitled to protection under two circumstances: (1) the lien property is actually sold and the proceeds are in the hands of the lienor, or (2) the lien is accompanied by possession. Not all intangible property is unsusceptible to possession, as, for example, stock certificates. But if the particular intangible property is of such a nature that it cannot be readily "possessed", the same cannot be said of its proceeds. Why, then, does it follow that the government is to be excused from the requirement of obtaining possession? Yet that was the conclusion voiced in the *Eiland* case. But it seems equally accurate to conclude that if the property cannot be possessed, then the government can protect its lien by collection on or a sale of the property prior to bankruptcy. Actual sale prior to bankruptcy is an alternative written into the statute itself. Thus, appellee is not reduced to impotency if it is required to meet a strict test of what constitutes "possession" for the purpose of claiming a super-priority for its liens in bankruptcy.

In general, appellee is well protected in a bankruptcy proceeding. If its claim for taxes is unsecured by a lien,

appellee is not relegated to the status of a general creditor. Rather, appellee is entitled to a preferred position under Section 64a(4) of the Bankruptcy Act. 11 U.S.C.A. Sec. 104a(4). Its claim for taxes, even when unsecured, is payable immediately after costs of administration, preferred wage claims and costs of setting aside a discharge; correspondingly, a tax claim is payable ahead of other priority debts, rental claims and dividends to general creditors.

Furthermore, unlike most other creditors, appellee's tax claims are discharged only by payment. A discharge in bankruptcy does not bar claims for taxes not actually paid. Yet appellee is favored with special priorities not available to claimants who must be paid in the bankruptcy proceeding or not at all. Section 17a of the Bankruptcy Act. 11 U.S.C.A. Sec. 35a(1).

If appellee has assessed its claim for taxes prior to bankruptcy, it is by virtue of the assessment and demand for its payment entitled to the status of a general lien holder. It is not even required to file its lien for record prior to bankruptcy in order to enjoy a lien status as to *all* of the property of the bankrupt in the bankruptcy estate. *United States v. England*, (CA 9, 1955) 226 F. 2d 205. As a claimant holding a lien, appellee is entitled to payment out of the bankruptcy estate prior to all preferred charges, including other tax claims. The only exception is to be found in the one case of a lien on personal property unaccompanied by possession. In this latter case, appellee's lien is subordinated by virtue of Section 67c to costs of administration and preferred wage claims. Its lien, however, would entitle it to priority over all other

tax claimants not enjoying a similar status. Hence it is difficult to see how appellee's tax collecting ability can seriously be affected by a decision herein favorable to appellant.

On the other hand, the status of bankruptcy administration will be seriously prejudiced if the orders appealed from are affirmed. Generally it is the policy of the courts to encourage a strong and vigorous administration of bankruptcy estates. Trustees in bankruptcy are encouraged to hunt out property and rights of the bankrupt and reduce them to possession for the benefit of the bankrupt's creditors, including appellee. But if recovery by the trustee is to be barred in any case in which he finds a stale notice of levy previously served, the administration of bankruptcy estates will be that much the poorer. And the classes of claimants entitled to public notice and warning under the statute will get neither. Appellee will be empowered to file its claim in bankruptcy and await payment out of the other assets collected by the trustee. Only if these assets are insufficient in amount will appellee be under an incentive to enforce its stale levy on the obligation held out of the bankruptcy estate. Had appellee realized upon the obligation by sale or collection prior to bankruptcy, it would have applied the proceeds to the bankrupt's taxes, reducing its bankruptcy claim pro tanto. But where appellee has not made collection, has not taken possession and has not attempted to enforce its levy, we have another case. Appellee ought not to have the power to freeze assets outside the jurisdiction of the bankruptcy court without being required to enforce its levy and collect or sell the obligation. Section 67c of the Bankruptcy

Act requires appellee to do just this, if it is interpreted as it was written.

CONCLUSION.

The order of the court below affirming the turnover order of the Referee in Bankruptcy herein should be reversed and the said orders be set aside with instruction that the lien of appellee herein be subordinated as required by Section 67c of the Bankruptcy Act.

Dated, San Francisco, California,

October 10, 1956.

Respectfully submitted,

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No. 15,187

**United States Court of Appeals
For the Ninth Circuit**

S. B. HUFFMAN, Trustee in Bankruptcy
of Charles Manfre Transportation Co.,
Bankrupt,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the
Northern District of California,
Southern Division.

BRIEF FOR APPELLEE.

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No. 15,187

**United States Court of Appeals
For the Ninth Circuit**

S. B. HUFFMAN, Trustee in Bankruptcy
of Charles Manfre Transportation Co.,
Bankrupt,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

**On Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

BRIEF FOR APPELLEE.

OPINION BELOW.

The District Court did not render any opinion other than that contained in the Order of May 16, 1956. (R. 18.)

JURISDICTION.

On November 1, 1955, a Petition for Order to Show Cause was filed by the Trustee in Bankruptcy and on the same date, the Order to Show Cause was entered and thereafter served upon the appellee. A Response

to the Order to Show Cause was filed by the appellee on January 17, 1956, and, on January 26, 1956, a Turnover Order was entered in favor of the appellee. A Petition for Review was taken by appellant to the District Court for the Northern District of California, Southern Division, on March 1, 1956, and on May 16, 1956, an order affirming the Turnover Order of the Referee was filed. Appellant filed a Notice of Appeal on May 26, 1956. Jurisdiction of this court is based upon Section 47, Title 11 of the United States Code and Section 1291 of Title 28, United States Code.

QUESTION PRESENTED.

Whether a levy for taxes upon a debt owed to the taxpayer before the taxpayer was adjudicated a bankrupt gave the United States the possession required by Section 67c of the Bankruptcy Act so as to make its lien for taxes completely prior in right to the claim of the Trustee in Bankruptcy and not subject to the payment of any debts.

STATUTES INVOLVED.

These appear in Appendix A, *infra*.

STATEMENT OF FACTS.

The facts as submitted to and found by the Referee in Bankruptcy are as follows:

(1) That prior to March 9, 1954, Manfre Transportation Company, Inc., was indebted to the United States

for transportation, income, and withholding employment taxes in the sum of \$18,457.57. That statutory liens were filed in Santa Cruz County, the place of business of the above-named taxpayer prior to March 9, 1954.

(2) That prior to March 9, 1954, Utility Trailer Sales Company of San Francisco, California, repossessed several trailers on a conditional sales contract with the above-named taxpayer; that on March 9, 1954, the United States of America by and through its District Director of Internal Revenue did cause a levy to be made on said Utility Trailer Sales Company, directing that all property, rights to property, moneys, credits, and bank deposits in the possession of said Utility Trailer Sales Company belonging to Charles Manfre Transportation Co. be delivered to said District Director, to be applied on said Charles Manfre Transportation Co.'s indebtedness for Federal tax liens; that the obligation of the Utility Trailer Sales Company at the time said levy was served to said Charles Manfre Transportation Co. was \$2,309.49; that said obligation was not paid to the United States, but when the taxpayer was adjudicated a bankrupt July 4, 1954, the same was paid to the Trustee who now holds it.

Appellant in the third paragraph of his "Statement of the Case" (Br. 3) appears to state that the appellee made some demand for certain trucks but no issue was raised or any point made about the trucks or the trailers either with the Referee in Bankruptcy or the District Court. The only issue below related to the debt of the Utility Trailer Sales. In the fourth paragraph (Br. 3),

appellant commences to state facts which do not appear in the record and argues therefrom—facts relating to the nature and extent of the taxpayer-bankrupt's claim against Utility Trailer Sales. This is continued through the brief. See particularly pages 9, 22, 23, 24, 27, 31 and 38. These unsupported arguments assert that the seized property was something other than an obligation of \$2,309.49 owing at the time of the levy as specifically found by the Referee and adopted by the District Court.

SUMMARY OF ARGUMENT.

When the tax levy was made upon the debt owing to the taxpayer, later the bankrupt herein, with service of notice of the levy upon the debtor of the taxpayer, it effected a seizure of the obligation and gave the United States possession of the debt or right against the debtor which the taxpayer then had. Such possession was effective against the Trustee in Bankruptcy of the taxpayer under Section 67c of the Bankruptcy Act.

The rights of all parties were fixed on the day the levy was effected upon the Utility Trailer Sales. On that date, the Utility Trailer Sales became the debtor of the United States and not the debtor of the bankrupt and if it failed to comply with the levy, it would subject itself to personal liability under Section 3710(b), Internal Revenue Code 1939.

The United States has at all times resisted the jurisdiction of the Bankruptcy Court to oust it from possession of the property seized. The mere response to the

Order to Show Cause issued by the Bankruptcy Court does not thereby confer jurisdiction upon that court to do other than order the trustee to pay the equivalent of the debt already received from the debtor to the United States.

ARGUMENT.

THE SERVICE OF THE LEVY UPON THE DEBTOR OF THE TAX-PAYER PRIOR TO THE FILING OF THE PETITION IN BANKRUPTCY CONSTITUTED A SEIZURE OF THE DEBT.

A. Introduction.

Section 67b of the Bankruptcy Act (11 U.S.C. 107b) provides, among other things, that a Federal tax lien which arises before bankruptcy is effective against the Trustee in Bankruptcy. Section 67c provides that with respect to personal property such a lien unless reduced to possession is subordinate to the payment of certain classes of debts under Section 64a(1) and (2) of the Bankruptcy Act (11 U.S.C. 104a(1) and (2)). The principal issue here is whether the United States' tax lien on the personal property herein was reduced to possession. The personal property was, as the Referee and the District Court found, the debt from Utility Trailer Sales to the taxpayer, Charles Manfre Transportation Co., which later became the bankrupt herein, in the amount of \$2,309.49. This debt, being intangible property, could not, obviously, have been made the subject of actual physical possession, such as tangible physical assets which could have been seized and sold at public auction as provided by Section 3693, Internal Revenue Code 1939; nor is this a case involving intan-

gible property which is evidenced by some negotiable instrument which also may be made the subject of actual possession and likewise may be subjected to public sale.

B. Intangible property is subject to a Federal tax lien, and may be levied upon.

Intangible property is subject to the Federal tax lien. *United States v. Liverpool, London & Globe Ins. Co.*, (1955) 348 U. S. 215; *Cannon v. Nicholas*, (C.C.A. 10, 1935) 80 F. 2d 934; *Kyle v. McGuirk*, (C.C.A. 3, 1936) 82 F. 2d 212; *United States v. First Capital Nat. Bank*, (C.C.A. 8, 1937) 89 F. 2d 116; *McKenzie v. United States*, (C.C.A. 9, 1940) 109 F. 2d 540; *United States v. Long Island Drug Co.*, (C.C.A. 2, 1940) 115 F. 2d 983, 985-86; *United States v. Warren R. Co.*, (C.C.A. 2, 1942) 127 F. 2d 134, 137-138; *Investment & Securities Co. v. United States*, (C.C.A. 9, 1944) 140 F. 2d 894; *United States v. Manufacturers Trust Co.*, (C.A. 2, 1952) 198 F. 2d 366.

Collection of outstanding tax liens may be effected by seizure and sale at public auction of the property, Section 3693, Internal Revenue Code 1939; or by foreclosure of the lien by judicial proceedings, Section 3678, Internal Revenue Code 1939; or in the case of intangibles as in this proceeding, the debt may be levied upon. Section 3710(a), Internal Revenue Code 1939; *United States v. Manufacturers Trust Co.*, *supra*; *United States v. Marine Midland Trust Co.*, (S.D. N.Y., 1942) 46 F. Supp. 38; *Matter of Mutual Carrier Co., Inc.*, (Conn., 1952) 52-2 U.S.T.C., Par. 9507; S.M. 3804A, V-1 Cum. Bul. 110 (1926).

C. Possession of an intangible obligation is complete when levied upon since actual physical possession is impossible.

This case is one of first impression for this court. The problem has, however, been presented to the Court of Appeals for the Fourth Circuit and that court held that the levy upon a debt prior to the filing of a petition in bankruptcy constituted a seizure of that debt and the Trustee in Bankruptcy took nothing as against the United States nor was the claim to be subordinated to other debts of the bankrupt. *United States v. Eiland*, (C.A. 4, 1955) 223 F. 2d 118. The court in deciding that case correctly observed, we submit, that the United States had taken all steps which were legally available to subject the debt to its possession.

The practical effect of the levy was to transfer the obligation to the United States, *United States v. Eiland*, 223 F. 2d at 123, and to make the debtor of the taxpayer a debtor of the United States. *United States v. Manufacturers Trust Co.*, (C.A. 2, 1952) 198 F. 2d 366, 368-69.

The levy which was served upon Utility Trailer Sales advised it of the seizure. It states:

You are hereby notified that there is now due, owing, and unpaid from Charles Manfre Transportation Co., Inc., 720 Walker Street, Watsonville, California, to the United States of America the sum of Eighteen Thousand Four Hundred Fifty-seven and 57/100 dollars (\$18,457.57) as and for an internal revenue tax.

You are further notified that all property, rights to property, moneys, credits and/or bank deposits now in your possession and belonging to the afore-said taxpayer and all sums of money owing from

you to the said taxpayer are hereby seized and levied upon for the payment of the aforesaid tax, together with penalties and interest, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth above from the amount now owing from you to the said taxpayer, or for such lesser sum as you may be indebted to him, to be applied in payment of the said tax liability.

There is no question the bankrupt could not have demanded the payment of the debt from the Utility Trailer Sales at any time after the service of the levy. The position urged by the appellant herein would materially increase the rights of the bankrupt without the benefit of any specific provision voiding the prior levy. A petition in bankruptcy was never intended to have such an effect. *York Mfg. Co. v. Cassell*, (1906) 201 U.S. 344; *Mason v. Citizens National Trust & Savings Bank of Los Angeles*, (C.C.A. 9, 1934) 71 F. 2d 246; *Matter of Knox-Powell-Stockton Co., Inc.*, (C.C.A. 9, 1939) 100 F. 2d 979. See also *Rode & Horn v. Phipps, et al.*, (C.C.A. 6, 1912) 195 Fed. 414 at 420.

The Utility Trailer Sales would have been completely exonerated had it paid the United States in satisfaction of the levy. *Columbia Nat. Life Ins. Co. v. Welch*, (C.C.A. 1, 1937) 88 F. 2d 333; *United States v. Ocean Accident and Guarantee Corp.*, (S.D. N.Y., 1948) 76 F. Supp. 277; *United States v. Marine Midland Trust Co.*, (S.D. N.Y., 1942) 46 F. Supp. 38; *Determan v. Jenkins*, (N.D. Ga., 1953) 111 F. Supp. 604. On the other hand the liability of the Utility Trailer Sales under Section 3710(b), Internal Revenue Code 1939, for failure to

turn over the property previously owing to the taxpayer would not be satisfied by payment of the proceeds to the Trustee in Bankruptcy as the petition in bankruptcy was filed subsequent to the levy.¹

D. The service of the levy made the seizure complete.

It is implied by appellant that the United States could have done more in respect to accomplish the seizure of the intangible property by seizing the books and records of the taxpayer as was done in the cases of *In re Brokol Manufacturing Co.*, (C.A. 3, 1955) 221 F. 2d 640 and *In re Mutual Carrier Co., Inc.*, (D. Conn., 1952) 52-2 U.S.T.C. 9507. (Appellant's Brief, p. 33; Footnote 29, p. 42.) In the case of *In re Mutual Carrier Co.*, as pointed out in the Appellant's Brief, the Internal Revenue did three things: "(1) Seized the books and records of the bankrupt prior to bankruptcy; (2) notified the account debtors of this seizure; and (3) directed the debtors to make payment of the accounts directly to the Collector." If this is sufficient to constitute a seizure under Section 67c which the Government contended it is and as these courts so held, then certainly the levy in this case has the same effect. Steps 2 and 3 were fully complied with. The debtor, Utility Trailer Sales, was advised of the seizure by the service of the

¹The only defenses available under Section 3710(b) are those expressly provided by the statute. Those are that no property was held which belonged to the taxpayer or the property was subject to a prior attachment or execution under any judicial process, neither of which existed here. *Commonwealth Bank v. United States*, (C.C.A. 6, 1940) 115 F. 2d 327; *United States v. Metropolitan Life Ins. Co.*, (E. D. Pa., 1941) 36 F. Supp. 399; *United States v. Manufacturers Trust Co.*, (C.A. 2, 1952) 198 F. 2d 366. One in position of Utility Trailer Sales would, therefore, be faced with double liability.

levy which also demanded payment to the Internal Revenue. The first step is missing in this case. However, the seizure of books and records has absolutely no legal effect whatsoever. While books kept in the ordinary course of business may, in a proper case, be some evidence of a debt, they certainly do not constitute the debt. The books and records could be altered, lost or even destroyed and the right to property would be unaffected. The presence or absence of such records has absolutely no bearing upon the existence or nonexistence of the rights to property. They are, at most, a matter of internal management and have no binding legal effect on anyone. This fact is graphically portrayed by the decision of *United States v. Manufacturing Trust Co.*, (C.A. 2, 1952) 198 F. 2d 366. In that case, the Internal Revenue levied upon the taxpayer's savings account by service of a levy upon the defendant-bank. The bank contended that it was not required to honor the levy since the bank deposit book had not been relinquished. The court held this did not constitute a defense for failure to honor the levy, and the book had nothing whatsoever to do with the obligation levied upon, which was the debt. Underlying the decision, of course, is the fact that the bank book was merely a means of internal control required by the bank but which had no legal bearing upon the existence or nonexistence of the right to receive the property.

The seizure of the books of the taxpayer in the case of *In re Mutual Carrier Co.* was obviously for the sole purpose of advising the District Director of who owed the taxpayer money so that he could then, in turn, levy

upon the debts. The decision supports the position of the United States in this case.

E. Section 67c was never designed to affect the levy supported tax lien in this case.

The underlying reasons for Congress enacting the subordination clause in Section 67c is described by Professor Collier as follows:

Notwithstanding the long established bankruptcy principle that valid liens should be enforceable in their entirety as against general, unsecured creditors and those entitled to priority, the realization developed that state-created statutory liens, like state priorities, to the extent they are recognized in bankruptcy run counter to the underlying objective of equitable distribution of the debtor's assets among all his creditors. As a result of long inaction of tax authorities, liens for taxes which had accumulated over a number of years often consumed a bankrupt's entire estate, even to the exclusion of costs and expenses of the bankruptcy proceedings. Statistics compiled by the Attorney General demonstrated that rent liens often consumed a very substantial portion of an estate and indeed the whole estate if not large. This situation was further aggravated in the later years of administration under the Act of 1898 by the growth of special legislation favoring public and private claims by granting liens to secure them. To afford protection to administrative costs and expenses and to wage claims, the authors of subdivision *b*, which expressly reaffirmed the validity of statutory liens, collaborated in a limited subordination of those liens.

4 *Collier on Bankruptcy*, p. 189.

See also *City of New Orleans v. Harrell*, (C.C.A. 5, 1943) 134 F. 2d 399; *Matter of Valde Refrigeration Manufacturing Co.*, (E.D. Mich., 1947) 75 F. Supp. 443; *City of New York v. Hall*, (C.C.A. 2, 1944) 139 F. 2d 935.

The section was designed to insure that the so-called "floating liens" would not amount to a surprise dissipation of the entire estate to the exclusion of costs of administration and priority wage claims. The tax levy changed the "floating lien" to a specific one against a specific item of property with ample notice.

The United States acquires a lien when the taxes are assessed. Section 3670, Internal Revenue Code 1939 (now Section 6321 Internal Revenue Code 1954, substantially unchanged). This lien is in the nature of a secret lien in that there is no public notice. It is also in the nature of a "floating lien" in that it covers all the property of the taxpayer at that time and all after-acquired property. *Glass City Bank v. United States*, (1945) 326 U. S. 265; *Citizens National Bank v. United States, et al.*, (C.C.A. 9, 1943) 135 F. 2d 527; *Nelson v. United States*, (C.C.A. 9, 1943) 139 F. 2d 162. This lien is valid as against the Trustee in Bankruptcy without the filing of any notice. *United States v. England*, (C.A. 9, 1955) 226 F. 2d 205. But the lien and the levy should not be confused. The levy, of course, would have no effect upon any property of the taxpayer outside of that being held by the person levied upon. The levy is in no way secret. The Utility Trailer Sales was fully advised that all rights to property had been seized. Any creditor of the taxpayer relying upon such an asset would neces-

sarily inquire as to the status thereof if such were material to an extension of credit or reliance upon the taxpayer's financial status. It is a most common auditing technique for an accountant to correspond with the debtor as to the status of the debt and any inquiry would have revealed the levy. With tangible property, its mere presence creates an inference of ownership.

The appellant contends that one of the underlying considerations in Section 67c and the necessity of actual possession is to give notice that such assets are no longer the taxpayer's. There was sufficient notice in this case. The service of any levy or execution upon an intangible is never a widely publicized fact. In most instances, the only parties with knowledge of such a seizure would be the person issuing the levy and the person upon whom the levy was served. No notice beyond this has ever been required nor is any additional step required under the Internal Revenue Code to perfect the seizure or give additional notice.

F. The tax levy seized the taxpayer's right to receive property, which was in existence at that time.

The appellant contends that the notice of levy upon the obligor was, in any event, insufficient to seize the obligation as it was not then in existence as a fixed amount. (Appellant's Brief, pp. 24-29.) It should be pointed out that this contention is entirely unsupported by the record. In fact, the Referee in Bankruptcy expressly found to the contrary in his findings of fact in the Turnover Order as follows:

* * * *

that the obligation of the Utility Trailer Sales Company at the time said levy was served to said Charles Manfre Transportation Co. was \$2,309.49; that said obligation was not paid to the United States, but when the taxpayer was adjudicated a bankrupt July 4, 1954, the same was paid to the trustee who now holds it.

Even assuming, without in any way conceding, that the exact amount was unknown at the time the levy was served, there was, nevertheless, a right to receive property in existence. The levy seized all property and *all rights to property*. The right to receive the property was quite clearly in existence and it was not brought into existence by later action of the Trustee in Bankruptcy whatever it may have been.

The appellant in support of his argument refers to the decisions in *United States v. Metropolitan Life Insurance Co.*, (C.C.A. 2, 1942) 130 F. 2d 149; *United States v. Penn. Mutual Life Insurance Co.*, (C.C.A. 3, 1942) 130 F. 2d 495; *United States v. Massachusetts Mutual Life Insurance Co.*, (C.C.A. 1, 1942) 127 F. 2d 880. All of these cases involved a levy upon the defendant insurance company for the cash surrender value of certain life insurance policies with that company upon the taxpayer's life. Their holding is that the insurance company holds no property or rights to property corresponding to such cash surrender values unless and until the taxpayer requests the money in writing and relinquishes the insurance policy, and it is only in a foreclosure of lien suit, where the taxpayer as well as the insurance company can be joined, that the taxpayer

can be compelled to exercise his demand for the surrender value. *United States v. Prudential Ins. Co.* (E.D. Pa., 1944) 54 F. Supp. 664.

The appellant further contends that a more acceptable procedure in this case would have been for the Government to have foreclosed its tax lien as provided in Section 3678, Internal Revenue Code 1939. Such an action is one which will carve out competing property interests. Here, contrary to appellant's argument in Footnote 13, page 26 of Appellant's Brief, there were no competing property interests. It was all the taxpayer's.

The procedure herein was as intended by Congress when they enacted the levy procedures under Section 3710, Internal Revenue Code 1939. The entire scheme for collection of taxes is designed to operate administratively without recourse to the courts except to enforce obedience to the administrative process or to determine actual controversies. To require a judicial proceeding to enforce every levy would actually swamp the courts since thousands of levies are issued every week with only the smallest fraction of controversies resulting therefrom. There is no reason why any other procedure should have been followed in this case.

G. The authorities relied upon by the appellant are not in point.

The cases relied upon by the appellant are distinguishable from the facts of this case. As stated at the outset, we are dealing here with intangible property which cannot be subjected to physical possession. All of the cases relied upon by the appellant involve tangible

property which can be subjected to physical possession and to public sale.

In *Goggin v. Division of Labor Law Enforcement*, 336 U. S. 118, the Internal Revenue Service seized certain assets prior to the filing of the petition of bankruptcy. This fact was not disputed, nor was there any question as to whether the seizure was sufficient under Section 67c. Following the petition in bankruptcy, the assets were relinquished by the Internal Revenue to the trustee for sale by him. The sole question presented to the Supreme Court was whether the proceeds from the sale of the property were to be subordinated as provided by Section 67c or whether only the costs of sale incident to those specific assets were to be deducted prior to payment of the tax claim. The court held that the rights of the parties were determined at the time the petition in bankruptcy was filed, and since the assets had been seized prior thereto, the subsequent relinquishment did not affect the rights of the parties. The holding of the Supreme Court was that the rights of the parties are determined the date the petition in bankruptcy is filed. Here, at the time of the filing of the petition in bankruptcy, the bankrupt had been completely ousted from any rights in and to the debt including any incident of possession.

The other decisions relied upon by the appellant also deal with tangible property. In the case of *Davis v. City of New York*, (C.C.A. 2, 1941) 119 F. 2d 559, the city had physical possession of assets prior to the filing of the petition in bankruptcy. In the case of *City of New York v. Hall*, the assets had not come into the physical

control of the city prior to the filing of the petition. The two decisions are in no way contrary to one another. The same is true of the other cases relied upon by the appellant. *United States v. Sands*, (C.A. 2, 1949) 174 F. 2d 384; *Henkin v. United States*, (C.A. 2, 1956) 229 F. 2d 895.

It is contended that the decision in the case of *In re Milo O. Frank*, (S.D. Cal., 1955) 55-2 U.S.T.C., Par. 9772, is contrary to the position urged by the appellee herein. (Appellant's Brief, pp. 10-11.) The decision is not contrary. That case involved a question of whether the Government had possession under Section 67c of certain securities which were in the hands of the bank upon which the District Director of Internal Revenue had previously levied. At the time the levy occurred, the certificates of the stock were in a safety deposit box at the bank. The box was subsequently opened and the bank retained possession of the certificates at all times. They were never in the possession of the United States. The court concluded that the service of the levy on stock certificates was not sufficient under Section 67c. These certificates could, of course, be made the subject of possession, and could be sold at public auction. The certificates embody the intangible property. The transfer of the certificate is necessary to transfer the rights of which it evidences. Such is clearly not the case here, as the obligation from Utility Trailer Sales to the bankrupt was not embodied in any document, or evidenced by any writing.

Appellant attempts to avoid direct precedent of *United States v. Eiland*, (C.A. 4, 1955) 223 F. 2d 118,

by arguing that since the Fourth Circuit did not explicitly deal with his ingenious argument contained in pages 39-42 of his brief, it ignored the fact that in clause (2) of 67c (not applicable, however, in this case) both "possession" and "levy" are used. It is a most gratuitous assumption that this was ignored. As was pointed out at the outset of this brief and by the court in the *Eiland* case, a levy effects a reduction to possession where actual physical possession is impossible—as with a debt. A levy does not effect possession when there is a physical thing to take possession of. Clause (2) of the section by using both "levy" and "possession" applies, therefore, to cases where the levy does not effect possession and to cases where there is possession not as a result of levy.

H. The Bankruptcy Court has jurisdiction to determine whether the trustee acquired any rights in the property, but not to oust the United States from possession.

Some mention is made of the jurisdiction of the Bankruptcy Court. It certainly had the jurisdiction to determine whether its officer, the trustee, acquired any rights to the debt, *Taubel-Scott-Kitzmiller Co. v. Fox*, (1924) 264 U.S. 426; *May v. Henderson*, (1925) 268 U. S. 111, although it had no jurisdiction to oust the United States from possession under a substantial claim. *Cline v. Kaplan*, (1944) 323 U.S. 97; *In re Brokol Mfg. Co.*, (C.A. 3, 1955) 221 F. 2d 640. The response to the Order to Show Cause gave the court no greater jurisdiction. See *Cline v. Kaplan*, *supra*, and *Henkin v. United States*, (C.A. 2, 1956) 229 F. 2d 895. Since, however, the court found that the trustee had no right to

the debt and would, therefore, be liable to the debtor for having received an amount equal to the debt, the most direct solution was to have the money paid to the United States who had the prior claim and avoid the necessity of having the money travel back through the debtor to the United States. As previously pointed out herein, the debtor's liability to the United States was also beyond the jurisdiction of the Bankruptcy Court.

CONCLUSION.

The District Court's Order affirming the Turnover Order to the Referee in Bankruptcy is correct, and should be affirmed.

Dated, San Francisco, California,
November 16, 1956.

Respectfully submitted,

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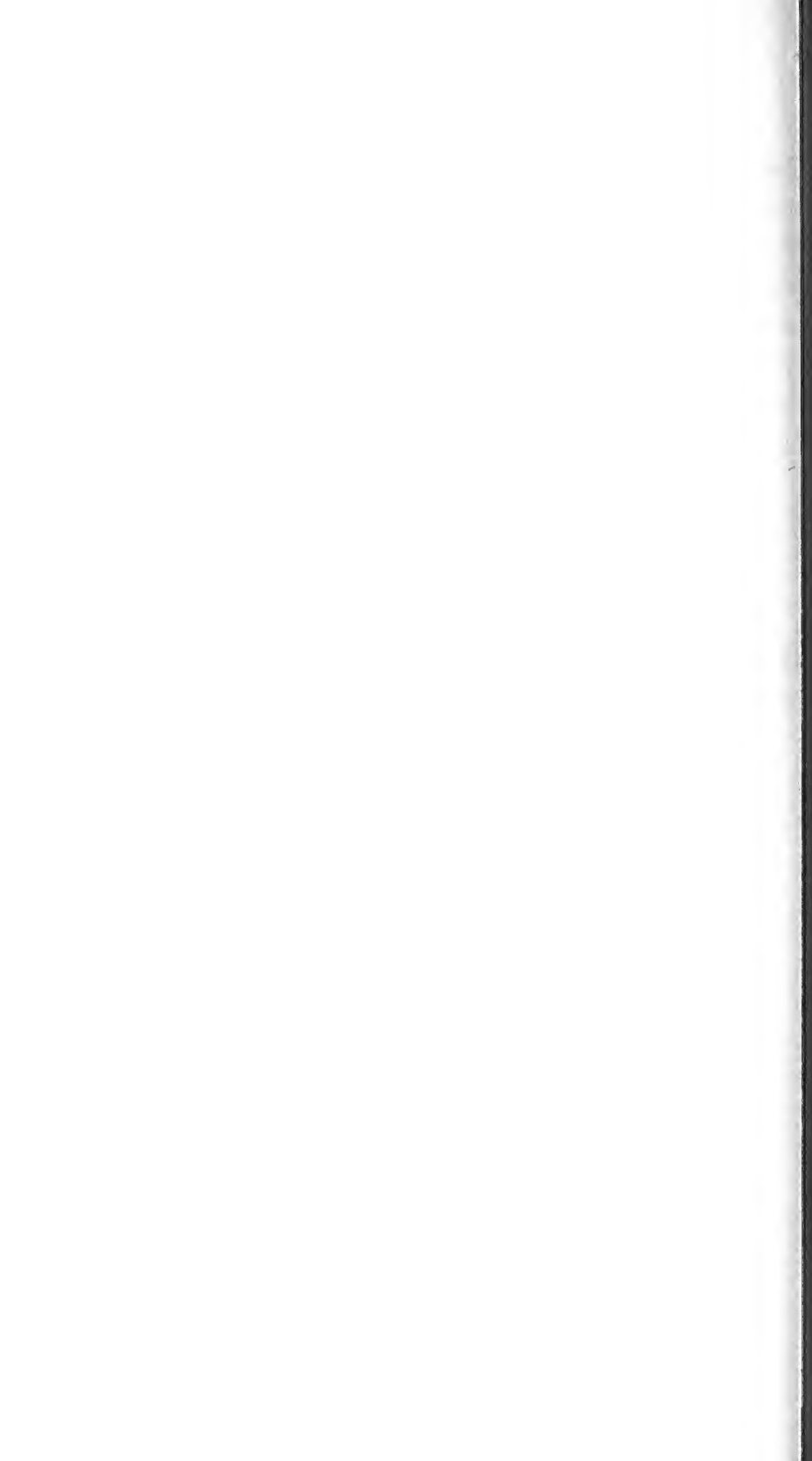
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(Appendix A Follows.)



Appendix “A”



Appendix A

Bankruptcy Act:

Section 67b (11 U.S.C. 107b) :

The provisions of section 60 of this Act to the contrary notwithstanding, statutory liens in favor of employees, contractors, mechanics, landlords, or other classes of persons, and statutory liens for taxes and debts owing to the United States or to any State or any subdivision thereof, created or recognized by the laws of the United States or of any State, may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition initiating a proceeding under this Act, by or against him. Where by such laws such liens are required to be perfected and arise but are not perfected before bankruptcy, they may nevertheless be valid, if perfected within the time permitted by and in accordance with the requirements of such laws, except that if such laws require the liens to be perfected by the seizure of property, they shall instead be perfected by filing notice thereof with the court.

Section 67c (11 U.S.C. 107c) :

Where not enforced by sale before the filing of a petition initiating a proceeding under this Act, and except where the estate of the bankrupt is solvent:

(1) Though valid against the trustee under subdivision *b* of this section, statutory liens, including liens for taxes or debts owing to the United States or to any State or any subdivision thereof, on personal property not accompanied by possession of such property, and liens, whether statutory or not,

of distress for rent shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision *a* of section 64 of this Act and such liens for wages or for rent shall be restricted in the amount of their payment to the same extent as provided for wages and rent respectively in subdivision *a* of section 64 of this Act; and

(2) The provisions of subdivision *b* of this section to the contrary notwithstanding, statutory liens created or recognized by the laws of any State for debts owing to any person, including any State or any subdivision thereof, on personal property not accompanied by possession of, or by levy upon or by sequestration or distraint of such property, shall not be valid against the trustee.

* * * *

Internal Revenue Code of 1939 (26 U.S.C.):

Section 3670. Property Subject to Lien.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

Section 3671. Period of Lien.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

Section 3672. Validity Against Mortgagees, Pledgees,
Purchasers, and Judgment Creditors.

(a) Invalidity of Lien Without Notice.—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) Under State or Territorial laws.—In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; or

(2) With clerk of district court.—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law authorized the filing of such notice in an office within the State or Territory; or

(3) With clerk of District Court of the United States for the District of Columbia.—In the office of the clerk of the District Court of the United States for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

(b) (1) Exception in case of securities.—Even though notice of a lien provided in section 3670 has been filed in the manner prescribed in subsection (a) of this section, or notice of a lien provided in section 3186 of the Revised Statutes, as amended, has been filed in the manner prescribed in such section or subsection (a) of this section, the lien shall not be valid with respect to

a security, as defined in paragraph (2) of this subsection, as against any mortgagee, pledgee, or purchaser, of such security, for an adequate and full consideration in money or money's worth, if at the time of such mortgage, pledge, or purchase such mortgagee, pledgee, or purchaser is without notice or knowledge of the existence of such lien.

(2) Definition of security.—As used in this subsection the term “security” means any bond, debenture, note, or certificate, or other evidence of indebtedness, issued by any corporation (including one issued by a government or political subdivision thereof), with interest coupons or in registered form, share of stock, voting trust certificate, or any certificate of interest or participation in, certificate of deposit or receipt for, temporary or interim certificate for, or warrant or right to subscribe to or purchase, any of the foregoing; negotiable instrument; or money.

(3) Applicability of subsection. — Except where the lien has been enforced by a proceeding, suit, or civil action which has become final before the date of enactment of the Revenue Act of 1939, this subsection shall apply regardless of the time when the mortgage, pledge, or purchase was made or the lien arose.

Section 3710. Surrender of Property Subject to Distraint.

(a) Requirement.—Any person in possession of property, or rights to property, subject to distraint, upon which a levy has been made, shall, upon demand by the collector or deputy collector making such levy, surrender such property or rights to such collector or deputy, unless such property or right

is, at the time of such demand, subject to an attachment or execution under any judicial process.

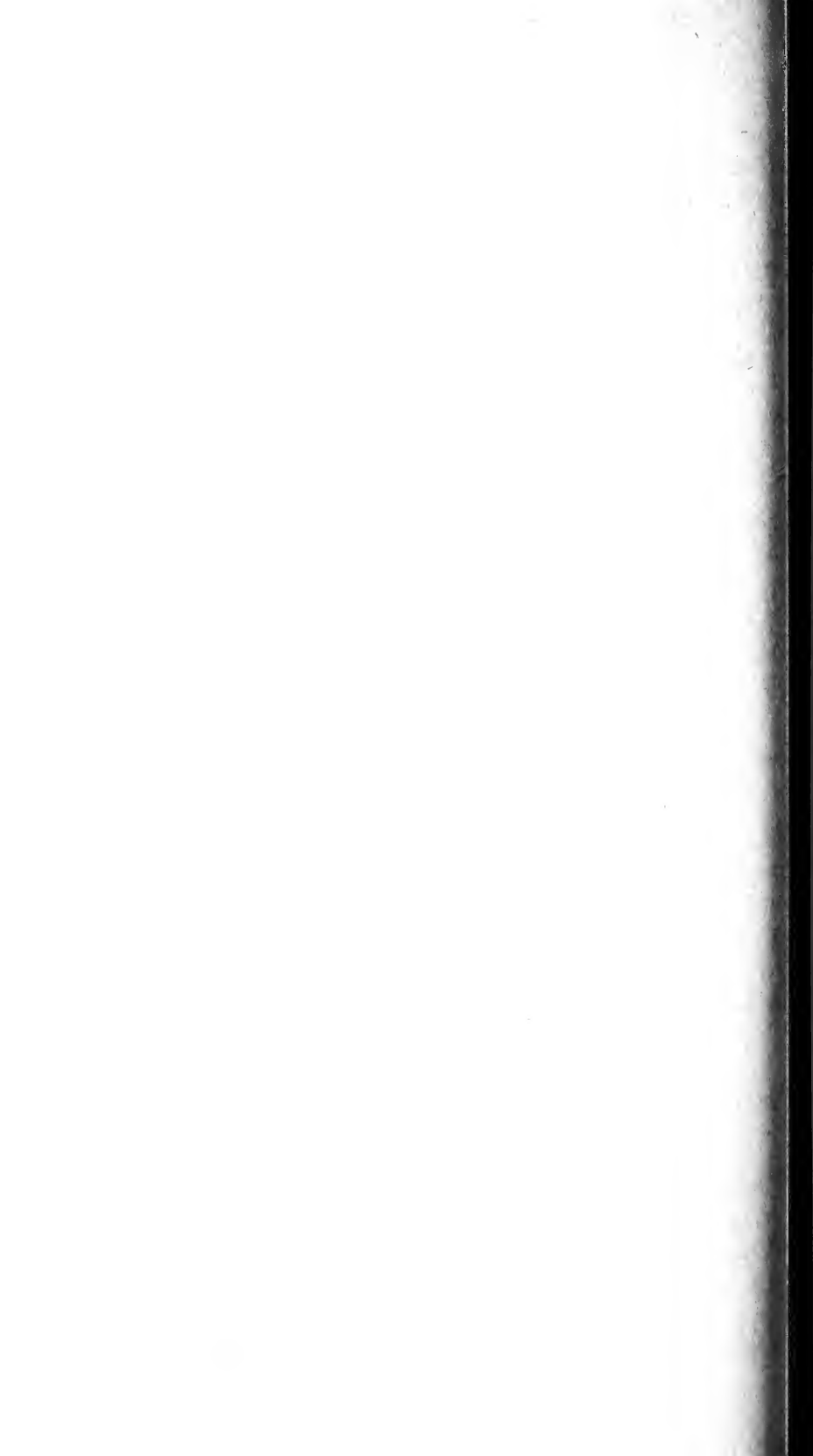
(b) **Penalty for Violation.**—Any person who fails or refuses to so surrender any of such property or rights shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes (including penalties and interest) for the collection of which such levy has been made, together with costs and interest from the date of such levy.

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No. 15,187

IN THE

United States Court of Appeals
For the Ninth Circuit

S. B. HUFFMAN, Trustee in Bankruptcy of
Charles Manfre Transportation Co.,
Bankrupt,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the
Northern District of California,
Southern Division.

APPELLANT'S REPLY BRIEF.

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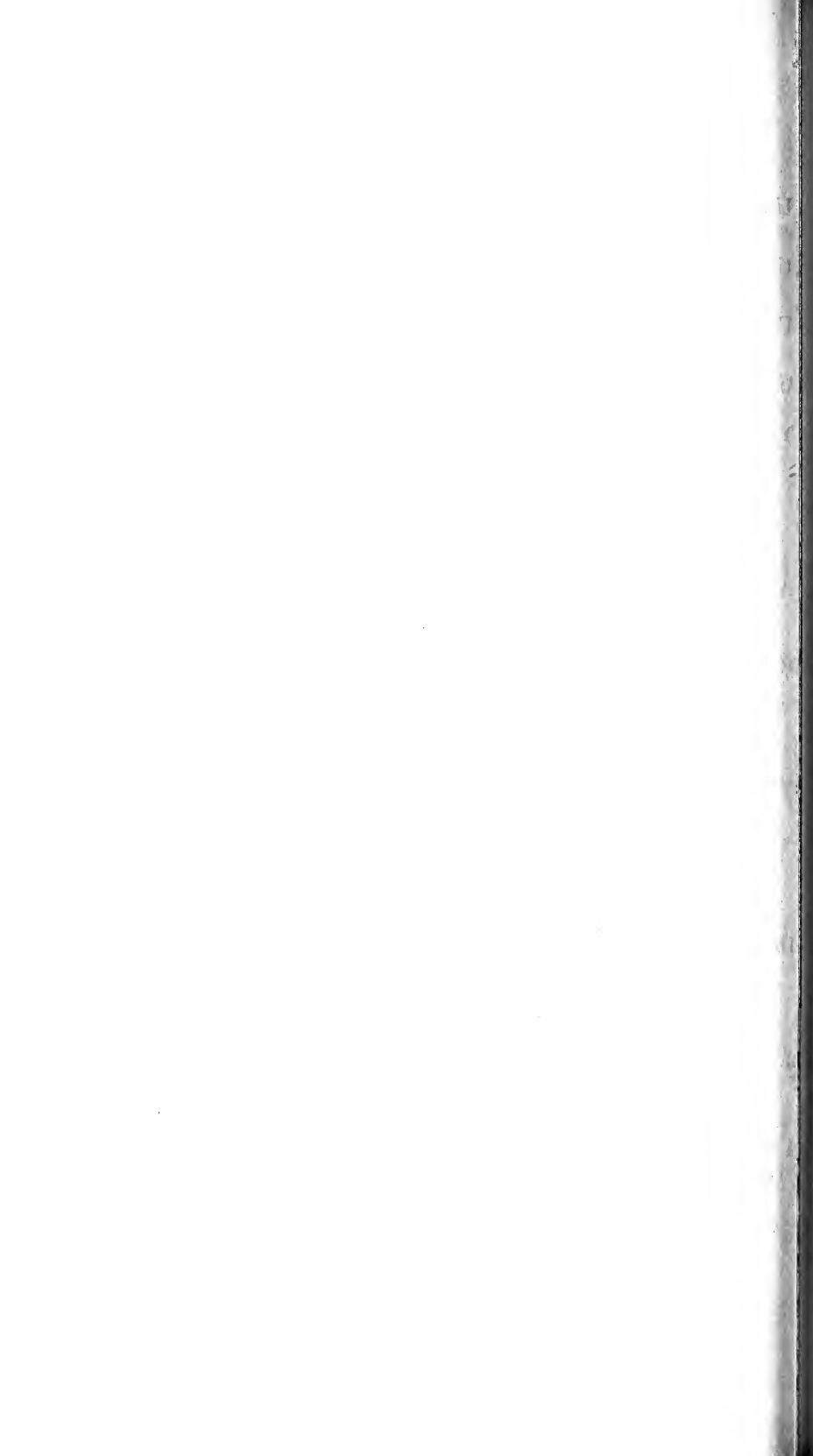
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2 Collier on Bankruptcy, 1955 Supplement (14th ed., 1942, Matthew Bender & Co.) p. 51 (text page 520)	14
4 Collier on Bankruptcy (14th ed., 1942, Matthew Bender & Co.):	
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No. 15,187

IN THE

**United States Court of Appeals
For the Ninth Circuit**

S. B. HUFFMAN, Trustee in Bankruptcy of
Charles Manfre Transportation Co.,
Bankrupt,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the
Northern District of California,
Southern Division.

APPELLANT'S REPLY BRIEF.

ARGUMENT.

I. THE SERVICE OF A NOTICE OF LEVY UPON A DEBTOR OF THE BANKRUPT PRIOR TO THE FILING OF THE PETITION IN BANKRUPTCY DOES NOT CONSTITUTE A SEIZURE OF THE DEBT.

A. Introduction.

We agree with appellee's statement in its brief (Ans. Br. p. 6) that the intangible obligation owing to the bankrupt became subject to the federal tax lien when that obligation came into existence. That is a legal proposition far too well established to be controverted and we

do not wish to be placed in the position of appearing to deny it.

But we do quarrel with appellee's conclusion that its lien was a lien "accompanied by possession" of the obligation within the meaning of Section 67c of the Bankruptcy Act. Thus, while appellee's claim for taxes is entitled to lien status in the bankruptcy proceeding (*United States v. England* (CA 9, 1955), 226 F. 2d 205), the lien must be subordinated in payment to the classes of claims protected under Section 67c.

Appellee itself admits that it never at any time obtained actual possession of the obligation. This failure it excuses by arguing that this case involves neither "tangible physical assets which could have been seized and sold at public auction as provided by Section 3693, Internal Revenue Code 1939; nor . . . intangible property which is evidenced by some negotiable instrument which also may be made the subject of actual possession and likewise may be subjected to public sale." (Ans. Br. pp. 5-6.)

But the fact that this case deals with intangible property other than a negotiable instrument is not significant. There is nothing in this case that would have prevented appellee from selling its lien rights against the obligation had it been inclined to do so. The fact that the obligation was contested and disputed would not prevent its sale by appellee although it is true, in the words of Judge Learned Hand, that "a disputed chose in action will not bring as good a price as an undisputed one; but neither will a chattel delivered at a sale if the title is doubtful." *United States v. Metropolitan Life Insurance Co.* (CA 2, 1942), 130 F. 2d 149, 151.

Nor was there anything in this case that would have prevented appellee from attempting to collect under the obligation or from foreclosing upon the obligation by way of suit had appellee been zealous in enforcing its rights. (Op. Br., pp. 13, 43.) Consequently, appellee should be treated under Section 67c in exactly the same manner as if the rights levied upon were rights in tangible property or rights in a documentary chose in action. Certainly the statute itself makes no distinction between various types of intangible properties; nor is there any good reason to draw any such distinction so long as appellee has these alternative procedures of enforcing its lien available to it, regardless of the type of intangible property involved.

B. If the United States has failed to acquire actual possession of personal property prior to bankruptcy, its lien thereon must be subordinated under Section 67c of the Bankruptcy Act.

Despite the difference in facts, appellee argues that this case is controlled by the decision in *United States v. Eiland* (CA 4, 1955), 223 F. 2d 118. Perhaps, as appellee observes (Ans. Br. p. 7), the United States had, in the *Eiland* case, "taken all steps which were legally available to subject the debt to its possession." But certainly the same statement cannot be made about appellee's actions in the present case. Appellee attempted neither to collect under its notice of levy (Section 3710, Internal Revenue Code, 1939), nor to sell any rights to the obligation it may have acquired under its notice of levy (Section 3693, Internal Revenue Code, 1939), nor to perfect its notice of levy by instituting a suit to foreclose against the obligation (Section 3678, Internal Revenue Code, 1939). Why

these things were not done appellee fails to say. Perhaps the very contingency of the obligation, prior to appellant's action in reducing it to a sum certain, was sufficient to discourage appellee from taking any of the supplementary courses of action readily available to it. Whatever the cause, appellee chose to do nothing to enforce its rights.

Appellee asserts (Ans. Br. p. 8) that once the notice of levy was served, the bankrupt was powerless to demand payment of the obligation from Utility Trailer Sales. The facts of this very case refute appellee; it was appellant, claiming under the bankrupt, not appellee, who actually made the demand for payment that was effective to compel Utility Trailer Sales to pay. (R. 4, 11.)

Appellee cites a number of cases to show that a petition in bankruptcy does not "void a prior levy." (Ans. Br. p. 8.) None of these cases is in point. *York Mfg. Co. v. Cassell* (1906), 201 U. S. 344, 26 S. Ct. 481, dealt not with a levy under the federal tax lien, but with the effect of a *failure* to file a notice of lien by a private conditional sales vendor. *Mason v. Citizens' National Trust & Savings Bank* (CA 9, 1934), 71 F. 2d 246, also deals with a problem other than the handling of a statutory lien under Section 67c of the Bankruptcy Act. It involves the problem of deciding whether the lien of a chattel mortgage reaches after-acquired property of the bankrupt. *In re Knox-Powell-Stockton Co., Inc.* (CA 9, 1939), 100 F. 2d 979, does in fact pertain to the tax liens but in another context. The issue there was whether or not a claim for federal taxes could properly be subordinated in payment to prior tax liens of the State of California. This Court

held that the lien claims for taxes were superior to the unsecured claims for taxes filed by the United States. *Rode & Horn v. Phipps* (CA 6, 1912), 195 Fed. 414, involved the validity of a private chattel mortgage in bankruptcy when the mortgagee had previously subordinated its lien to that of another creditor.

Furthermore, none of these cases cited by appellee could possibly have decided the problem we are faced with in the present case. All of them concerned applications of the bankruptcy law as it existed prior to 1938, the year in which Section 67c was added to the Bankruptcy Act. Act of June 22, 1938, c. 575, Sec. 67; 52 Stat. L. 875 at 877. All but the *Knox-Powell-Stockton Co., Inc.*, case were decided prior to 1938, and the latter was expressly decided under the Bankruptcy Act of 1898, as amended in 1926. 100 F. 2d 979 at 981. See 4 Collier on Bankruptcy (14th ed., 1942, Matthew Bender & Co.) ¶67.02, footnotes 24, 27.

Appellee claims that unless this Court award it the fund created out of appellant's efforts, Utility Trailer Sales will be required to pay twice. This assertion disregards the record herein. In making the compromise settlement with Utility Trailer Sales herein, appellant expressly agreed to hold Utility Trailer Sales harmless for any liability appellee might assert against it outside the bankruptcy court. (R. 4-5.) There can be no double liability arising out of this controversy and appeal. Appellee's intimation that Utility Trailer Sales may be liable directly to it under the notice of levy is an attempt to introduce another law suit into the present controversy that is independent of it; furthermore, appellee itself

never chose to prosecute this extraneous claim of liability at any time prior to this appeal although appellee has not lacked opportunity to do so.¹

C. Service of a notice of levy not accompanied by an actual seizure of property is ineffective to reduce an intangible obligation to possession.

Appellee argues that the actual seizures of property and rights to property made by the Collector in the cases of *In re Brokol Manufacturing Co.* (CA 3, 1955), 221 F. 2d 640, 641, and *In re Mutual Carrier Co., Inc.* (D. C. Conn., 1952), 52-2 USTC ¶ 9507, were immaterial (Ans. Br. pp. 9-10). If Section 67c, clause (1) spoke in terms of "levy" as well as of "possession," appellee might well be right. But so long as Section 67c demands that the United States lien for taxes be "accompanied by possession" appellee must make an actual seizure of property or rights to property in order to claim the property or rights to property free of the bankruptcy administration. That was the strict test demanded of the United States in the *Brokol* and *Mutual Carrier* cases and the same should be demanded of appellee herein.²

¹This is not to intimate that Utility Trailer Sales lacks an adequate defense to any such action on appellee's part. A notice of levy served on an unaccrued obligation which is contested by the obligor is unenforceable. *United States v. Metropolitan Life Insurance Co.*, (CA 2, 1942) 130 F. 2d 149; *United States v. Penn Mutual Life Insurance Co.*, (CA 3, 1942) 130 F. 2d 495; *United States v. Massachusetts Mutual Life Insurance Co.*, (CA 1, 1942) 127 F. 2d 880.

²The fact that seizure of a taxpayer's passbook may not be essential to enforce a levy on a bank account independent of bankruptcy proceedings ought not to control this case. See *United States v. Manufacturer's Trust Co.*, (CA 2, 1952) 198 F. 2d 366. In suing Manufacturer's Trust Co., the United States was not required to show that its lien was "accompanied by possession" as appellee must show in order to stand outside the subordination clause of Section 67c in a bankruptcy proceeding. Furthermore,

Nor, as appellee implies, is this an idle requirement. Actual seizure of personal property is required under Section 67c for the purpose of giving notice to innocent wage earners and creditors of appellee's claim of lien on the bankrupt's personal property. Only by publicly disturbing the bankrupt's possession can sufficient notoriety be created to meet the policy of Section 67c. Anything less than actual seizure is not enough. All that was done in the present case was to notify the bankrupt's conditional obligor of the existence of appellee's lien and to demand payment thereon. (Ans. Br. pp. 9-10.) Nothing of a public nature was done to advise the bankrupt's employees or creditors of appellee's lien. As appellee itself admits, "the service of any levy or execution upon an intangible is never a widely publicized fact. In most instances, the only parties with knowledge of such a seizure would be the person issuing the levy and the person upon whom the levy was served." (Ans. Br. p. 13.) In the absence of public notoriety and warning to its actions, appellee's claim of lien should be subordinated under the express terms of Section 67c as representing a statutory lien for taxes "unaccompanied by possession."

Appellee contends further that the public notice policy underlying Section 67c was met in the present case by the mere fact of service of the notice of levy. Appellee points out that after the service of the notice of levy, Utility Trailer Sales was itself fully advised of the existence of the federal tax lien. (Ans. Br. pp. 12-13.) But

distrain on a bank account is expressly authorized by statute (Section 3690, Internal Revenue Code, 1939), which is not true of an indebtedness not evidenced by a writing.

such notice to the person levied upon is hardly notice to the public at large. Creditors, and more importantly wage earners, of the taxpayer would not be given warning by a procedure that called only for the service of a document on a third party. If, for example, accounts receivable were levied upon without public seizure of account books in the possession of the taxpayer, both creditors and employees would be misled by the apparent assets of the taxpayer that had not been disturbed by the government. Mere service of a notice of levy is not a widely publicized act.

Appellee attempts to surmount this obstacle to its conclusion that a notice of levy should be equated with possession by putting the burden of inquiry upon others; thus the taxpayer's employees and would-be creditors should be required to discover for themselves whether or not the taxpayer's personal properties have been levied upon by the government. It is not, as appellee asserts, a common auditing technique of employees and creditors to correspond with the taxpayer's debtors to ascertain the status of the taxpayer's accounts. (Ans. Br. p. 13.) Appellee has reference to an auditing technique commonly employed by *the taxpayer's* own accountants in order to verify its assets, not by accountants for strangers dealing with the taxpayer. Certainly appellee ought not to be permitted to prevail herein because of what third parties would or would not do. Section 67c lays the burden squarely upon appellee's own broad and formidable shoulders to reduce its lien to possession prior to bankruptcy. This appellee has failed to do. Consequently it must suffer its lien to be subordinated in the limited fashion demanded by Section 67c.

II. A SERVICE OF A NOTICE OF LEVY UPON AN UNACCRUED AND UNCERTAIN OBLIGATION IS INEFFECTIVE AND UNENFORCEABLE.

Appellee's main defense to this point made by appellant in its opening brief (Op. Br. pp. 24-29) is to argue that the findings of fact herein state that the obligation of Utility Trailer Sales at the time the levy was served was \$2,309.49, the sum later paid to appellant. (Ans. Br. pp. 13-14.) While it is true that the findings of fact are stated in such terms, these findings are incorrect and are not an accurate reflection of the record herein. R. 3-4, 20.) The matter was submitted to the Referee in Bankruptcy on an agreed stipulation of facts. (R. 16-17, 20-27.) Under these circumstances, this Court is free to draw its own conclusions from the undisputed facts. *Gensinger v. Commissioner* (CA 9, 1953), 208 F. 2d 576, 583; *McGah v. Commissioner* (CA 9, 1954), 210 F. 2d 769, 771; As this Court stated in *Pacific Portland Cement Co. v. Food Machiney & Chemical Corp.* (CA 9, 1949), 178 F. 2d 541, 548, "we may make our own inferences from undisputed facts or purely documentary evidence."

Appellee asserts further that in any event a *right to property* was in existence on the date the notice of levy was served. But there can be no right to property in one person unless another is under a correlative duty to deliver the property up.³ And this was not the fact on

³Furthermore, it is difficult to understand how an obligation to pay money can represent a "right to property" in view of the amendment by Congress in 1954 to add the phrase "or obligated with respect to (property or rights to property)" to the statute authorizing levies. Section 6332(a), Internal Revenue Code, 1954. This changed language was expressly called to appellee's attention in our opening brief, but no answer has been made to it (Op. Br. pp. 25-26, footnote 12).

the date the levy was served. On that date and subsequently, Utility Trailer Sales denied both the amount and the very existence of any liability to the bankrupt. It was not until the compromise settlement of appellant's turnover proceeding against Utility Trailer Sales that the obligation became fixed and certain. At that time, the amount owing was determined to be \$2,309.49 and that sum was paid over *to appellant*. (R. 3-4.)

It is true, as appellee asserts, that three of the cases cited in our opening brief deal with the problem of levying upon life insurance policies. (Ans. Br. p. 14.) But this fact does not render these decisions inapplicable herein. The underlying rationale of these three decisions, each of a Court of Appeals for a different circuit, applies to this case as well as to the rights of the government under a levy upon an *unaccrued* obligation to pay over the cash surrender value of a life insurance policy to the insured. In both situations a levy is unenforceable because (1) there is nothing actually due and owing at the time the levy is served, and (2) there are alternative procedures available to the government to reach the unaccrued obligation to determine the conflicting rights of the insured, the insurer and the government.

Parenthetically we should add that it is not our position that *all* levies must be enforced by judicial proceedings. We merely point out that it is incumbent upon appellee to take steps to enforce any levies made by it that have been returned unsatisfied. If appellee does not see fit to enforce the many rights it has been given by Congress under the Internal Revenue Code, appellee ought to suffer the consequences of its inaction. It should not be treated

herein as if it had actually enforced its notice of levy when in fact it took no subsequent action. This failure to act is exactly the type of conduct Congress intended to penalize when it added Section 67c to the Bankruptcy Act. 4 Collier on Bankruptcy (14th ed., 1942, Matthew Bender & Co.), ¶67.20(3); *City of New York v. Hall* (CA 2, 1944), 139 F. 2d 935, 936.

III. THE APPLICABILITY OF APPELLANT'S AUTHORITIES TO THE CONTROVERSY HEREIN.

Appellee states that appellant's authorities are not in point because they "involve tangible property which can be subjected to physical possession, and to public sale." (Ans. Br. pp. 15-16.) This is not a true statement. *In re Milo O. Frank* (S. D. Cal., 1955), 55-2 USTC ¶ 9772, dealt with the application of Section 67c to the tax lien of the government against *stock* of the bankrupt.⁴ Among the assets seized in *In re Brokol Manufacturing Co.* (CA 3, 1955), 221 F. 2d 640, were the bankrupt's *accounts receivable*. See *In re Brokol Manufacturing Co.* (D.C. N.J., 1953), 109 F. Supp. 562, 563. Again in the case of *In re Mutual Carrier Co., Inc.* (D.C. Conn., 1952), 52-2 USTC ¶ 9507, *accounts receivable* of the bankrupt were involved.

Apart from these three cases in which it affirmatively appears that intangible property was involved, there is nothing to show in the record of the remaining cases cited

⁴As far as we can ascertain the government has not appealed the *Frank* case to this Court although the decision was against it. Subsequently another of the district courts in this Circuit refused to follow the *Eiland* case. *Northeast Clackamas C. E. Coop. v. Continental Casualty Co.*, (D.C. Ore., 1955) 140 F. Supp. 903, 905.

by appellant in its opening brief that *only* tangible property had been seized. For example, in *City of New York v. Hall* (CA 2, 1944), 139 F. 2d 935, the property attempted to be seized prior to bankruptcy was described as "personal property," which might or might not include intangible property. The same is true of *Goggin v. Division of Labor Law Enforcement* (1949), 336 U. S. 118, 122, 69 S. Ct. 469, 471, in which the government "perfected a statutory lien upon the *personal property* of the Kessco Engineering Corporation, a California corporation, and took *actual possession of such property* pursuant to that lien." (Emphasis added.) Inferentially, at least, the personal property of a business would include intangible as well as tangible personalty, but this fact the record does not spell out, as appellee claims. See *Division of Labor Law Enforcement v. Goggin* (CA 9, 1947), 165 F. 2d 155, 156. Nor was the seizure in *United States v. Sands* (CA 2, 1949), 174 F. 2d 384, 385, limited to tangible property; it included "the personal property of the taxpayer." The same is true of two other authorities cited in our opening brief: *Henkin v. United States* (CA 2, 1956), 229 F. 2d 895, 896 (all of the bankrupt's "assets"); and *Davis v. City of New York* (CA 2, 1941), 119 F. 2d 559, 560 (all of the bankrupt's "property").

Furthermore, there is nothing inherently impossible, as appellee intimates, in holding a public sale of an intangible obligation. Even a disputed chose in action is capable of being sold at public auction. See *United States v. Metropolitan Life Insurance Co.* (CA 2, 1942), 130 F. 2d 149 at 151. And an obligation, even though intangible, is capable of being collected as appellant, not appellee, has demonstrated in this very case.

Appellee attempts to reconcile its position in this case with the distinction drawn between "levy" and "possession" in Section 67c itself by asserting that "possession" in one part of Section 67c means something different than it does in another. See the discussion in our opening brief at pp. 39-42. Appellee argues that "possession" under clause (2) of Section 67c refers only to cases where actual physical possession is possible. If it is so restricted under clause (2), the concept of "possession" should similarly be restricted in clause (1) of Section 67c, the clause that governs the present appeal.

Appellee itself points out that under clause (2) the word "levy" was added to cover the situation where actual physical possession had not been obtained but only a levy had been made. (Ans. Br. p. 18.) If Congress thought it necessary to add the word "levy" to clause (2) to cover this situation, its failure to insert the same word in clause (1) must mean that a mere levy is not sufficient to meet the test of "possession."⁵

IV. JURISDICTION OF THE BANKRUPTCY COURT.

Appellee asserts that the bankruptcy court had jurisdiction over this controversy. (Ans. Br. p. 18.) With this statement we agree.⁶ But we submit that appellee's

⁵If this difference in the language between clauses (1) and (2) of Section 67c was considered by the Court in *United States v. Eiland*, (CA 4, 1955) 223 F. 2d 118, that fact does not appear in its opinion. We have searched the briefs of counsel for the trustee in that case and cannot find that the point was urged to that Court.

⁶Appellee's filing of its response to the order to show cause put appellee into this proceeding with both feet and completely under the jurisdiction of the bankruptcy court for the purpose of determining its rights to the fund. By its failure to question the sum-

very failure to raise a question of jurisdiction is inconsistent with its claim of "possession." Had the facts here shown that the bankruptcy court was "interfering" with appellee's possession of certain property, appellee would have been the first to question the jurisdiction of the bankruptcy court. *In re Brokol Manufacturing Co.* (CA 3, 1955), 221 F. 2d 640, 642; *Henkin v. United States* (CA 2, 1956), 229 F. 2d 895. Appellee's failure to raise such a defense here shows that appellee itself knew that it had no possession of the claim against Utility Trailer Sales and that its possessory rights were not being interfered with because it had none.

CONCLUSION.

The orders below should be reversed.

Dated, San Francisco, California,

December 10, 1956.

Respectfully submitted,

PAUL E. ANDERSON,

MILTON MAXWELL NEWMARK,

Attorneys for Appellant.

Of Counsel:

KENT AND BROOKES

mary jurisdiction of the bankruptcy court in its response, appellee "shall be deemed to have consented to such jurisdiction". See 2a(7) of the Bankruptcy Act. 11 U.S.C. §11(a)(7), abrogating the rule of *Cline v. Kaplan*, (1944) 323 U.S. 97, 65 S.Ct. 155, to the contrary. See 1955 Supplement to 2 Collier on Bankruptcy (14th ed., 1942, Matthew Bender & Co.) p. 51 (text page 520).



No. 15188

United States
Court of Appeals
for the Ninth Circuit

LEO MANTIN,

Appellant,

vs.

BROADCAST MUSIC, INC., a corporation, et al.,
Appellees.

Transcript of Record

Appeal from the United States District Court for the Southern
District of California, Central Division

FILED

DEC 11 1956

PAUL P. O'BRIEN, CLERK



No. 15188

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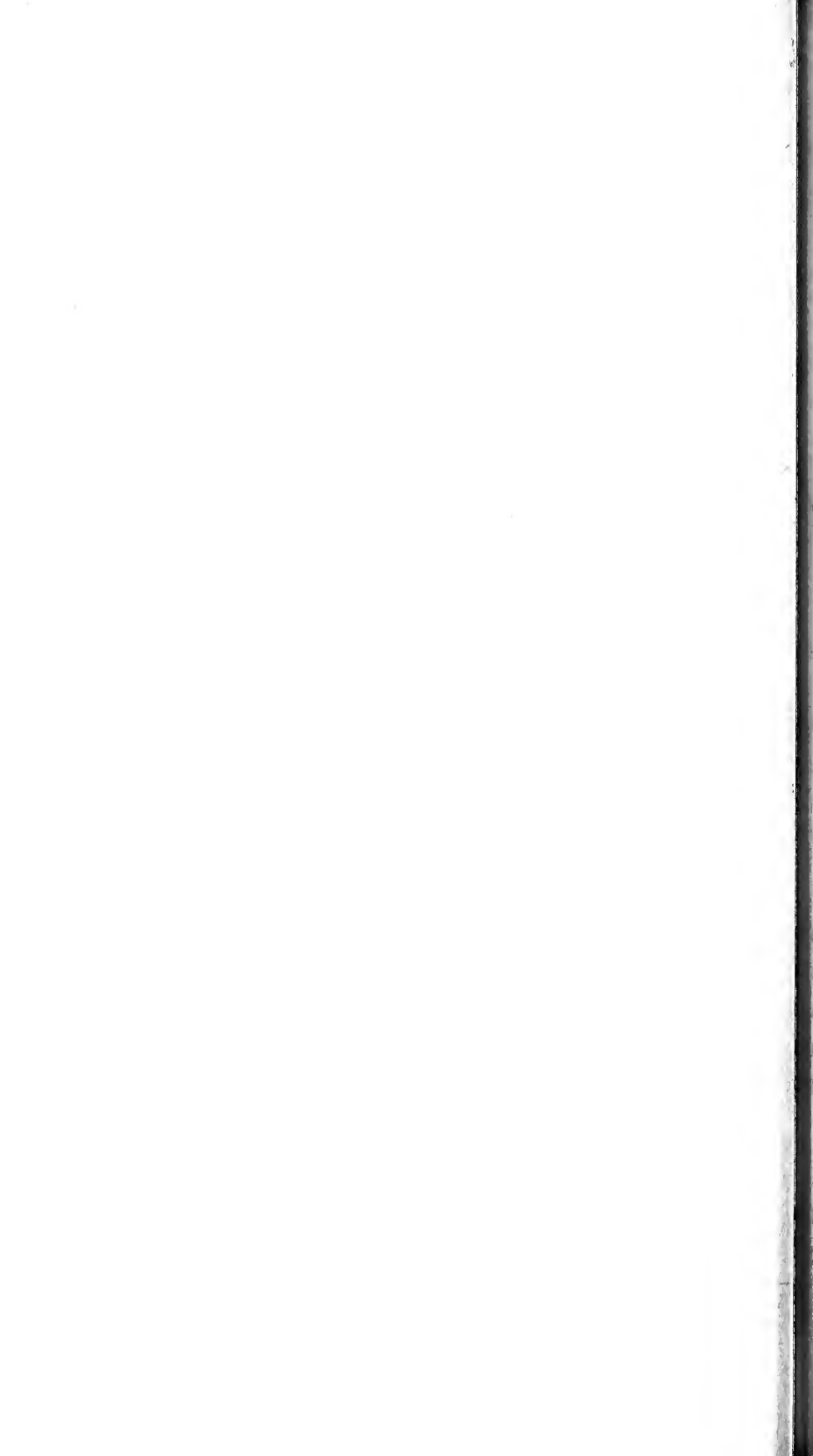
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* Page numbers appearing at foot of page of original Transcript of Record.



In the District Court of the United States for the
Southern District of California, Central Division

No. 17785-PH

LEO MANTIN,

Plaintiff,

vs.

BROADCAST MUSIC, INC., a New York corporation, et al.,
Defendants.

COMPLAINT FOR DAMAGES FOR MISAPPROPRIATION OF COMMON LAW MUSICAL PROPERTY AND FOR INJUNCTION AND ACCOUNTING OF PROFITS

(Jury Trial Requested)

Now comes the plaintiff above named, and for a first cause of action against the defendants above named and each of them, alleges as follows:

First Cause of Action

I.

That plaintiff is an internationally known producer of musical acts and revues (including a well known musical sketch entitled "Moulin Rouge") and plaintiff is himself a professional entertainer and composer residing in the County of Los Angeles, State of California.

II.

That at all times herein mentioned, the defendants Broadcast Music, Inc., a New York corporation; United Artists Corporation, a Delaware corporation; Columbia Broadcasting System, Inc., a New York corporation; National Broadcasting

Company, Inc., a New York corporation; American Broadcasting Company, Inc., a Delaware corporation; Romulus Films, Ltd., a corporation; London Record Sales, Inc., a New York corporation; Brunswick Record Corporation, a New York corporation; Capitol Records Distributing Co., Inc., of California, a Delaware corporation; Capitol Records Distributing Co., Inc., of Georgia, a Delaware corporation; Columbia Recording Corporation, a Delaware corporation; Columbia Recording Corporation, a New York corporation; Decca Distributing Corporation, a New York corporation; Decca Records, Inc., a New [3] York corporation; Mercury Record Corporation, a Delaware corporation; Mercury Record Distributors, Inc., an Illinois corporation; RCA Victor Company, Inc., a Maryland corporation; Radio Corporation of America, a Delaware corporation; RCA Manufacturing Co., Inc., a Delaware corporation, Doe One Corporation, Doe Two Corporation, Doe Three Corporation, Doe Four Corporation, Doe Five Corporation, Doe Six Corporation, Doe Seven Corporation, Doe Eight Corporation, Doe Nine Corporation and Doe Ten Corporation were and are now corporations duly organized and existing under and by virtue of the laws of the State of New York, Illinois, Maryland, or Delaware, or states or nations other than the State of California, although said defendants and each of them are either duly qualified to do business in the State of California or have been doing business in the State of California and in the County of Los Angeles.

III.

That the defendants, Doe One, Doe Two, Doe Three, Doe Four and Doe Five are residents and citizens of states other than the State of California.

IV.

That the fictitiously named defendants, Doe One, Doe Two, Doe Three, Doe Four, Doe Five, Doe One Corporation, Doe Two Corporation, Doe Three Corporation, Doe Four Corporation, Doe Five Corporation, Doe Six Corporation, Doe Seven Corporation, Doe Eight Corporation, Doe Nine Corporation and Doe Ten Corporation are named herein by said fictitious names for the reason that the true names of said defendants are unknown to plaintiff, but plaintiff asks leave and permission of Court to insert the true names when ascertained. [4]

V.

That this action is brought for infringement of plaintiff's common law rights in that certain musical composition more particularly referred to hereinafter in this complaint, and this Court has jurisdiction of this cause of action under and by virtue of Section 1332 of Title 28, U. S. Code Judiciary and Judicial Procedure, by reason of diversity of citizenship between plaintiff and defendants, and by reason of the fact that the matter in controversy exceeds the sum or value of \$3,000.00, exclusive of interest and costs.

VI.

That during the year 1922, plaintiff originated,

created and composed a unique, novel and original song and musical composition, with words and music, entitled "Where Is Your Heart", which song and musical composition have never at any time been published in any form by plaintiff or with plaintiff's knowledge, authority and consent, and have at all times remained in manuscript form, and plaintiff has at all times owned and retained and does now own and retain all common law rights therein and thereto. A true copy of the words and music of said song and composition is being filed with the Clerk of this Court concurrently with the filing of this complaint, marked plaintiff's Exhibit A, and by this reference incorporated herein the same as if fully set forth at length herein.

VII.

That plaintiff has sung and performed his said song entitled "Where Is Your Heart" in nightclubs, music halls, theatres, hotels and other places of amusement and entertainment in the United States, England, France, and many other countries throughout the world, and at all times hereinafter referred to in this complaint, defendants and each of them have had full [5] knowledge and notice of plaintiff's rights of ownership and exclusive rights of performance, use and exploitation of said song and musical composition throughout the world.

VIII.

That notwithstanding said notice and knowledge by defendants of plaintiff's rights in the premises,

defendant Romulus Films, Ltd., heretofore produced, and on or about the 1st day of February, 1953, in conjunction with defendant United Artists Corporation, released, distributed and caused to be exhibited in the County of Los Angeles, State of California, and in each and all of the other states of the United States, and elsewhere throughout the world, a motion picture photoplay entitled "Moulin Rouge", in which was incorporated and recorded a song entitled "Where Is Your Heart", sung by a character portrayed in said motion picture by Miss Zsa Zsa Gabor, and which song substantially copies and appropriates the words and music of plaintiff's original song and composition entitled "Where Is Your Heart".

IX.

That during the year 1953, and continuously up to and including the date of filing this complaint, defendant Broadcast Music, Inc. published or caused to be published said song entitled "Where Is Your Heart" or "The Song From Moulin Rouge" in sheet music form, and said defendant has caused said sheet music to be used by professional entertainers and to be sold and distributed to the general public continuously to, until and including the date of filing this complaint, in the County of Los Angeles, State of California, and elsewhere throughout the United States and the rest of the world. [6]

X.

That continuously from on or about the 1st day of February, 1953, up to and including the date of

filing this complaint, defendants London Record Sales, Inc., Brunswick Record Corporation, Capitol Records Distributing Co., Inc. of California, Capitol Records Distributing Co., Inc. of Georgia, Columbia Recording Corporation (a Delaware corporation), Columbia Recording Corporation (a New York corporation), Decca Distributing Corporation, Decca Records, Inc., Mercury Record Corporation, Mercury Record Distributors, Inc., RCA Victor Company, Inc., Radio Corporation of America, RCA Manufacturing Co., Inc., have caused said song entitled "Where Is Your Heart" or "The Song From Moulin Rouge" to be recorded on phonograph records and sold and distributed to the general public in the County of Los Angeles, State of California, and in each and all of the other states of the United States and elsewhere throughout the world.

XI.

That continuously from on or about the 1st day of February, 1953, up to and including the date of filing this complaint, defendants Columbia Broadcasting System, Inc., National Broadcasting Company, Inc., and American Broadcasting Company, Inc., have caused said song and musical composition entitled "Where Is Your Heart" or "The Song From Moulin Rouge" to be performed and broadcast over the facilities of the radio broadcasting systems owned and operated by said defendants and have caused the same to be broadcast and rebroadcast over hundreds of radio stations through-

out the United States, including the County of Los Angeles, State of California. [7]

XII.

That a copy of said song and musical composition entitled "Where Is Your Heart" or "The Song From Moulin Rouge", recorded in said motion picture film, published in said sheet music form, recorded on said phonograph records and sold and distributed by the defendant phonograph recording companies named in this complaint, and which song was performed and broadcast over the radio broadcasting facilities of the defendant broadcasting corporations, all as hereinbefore alleged herein, is in the musical form and content marked Exhibit B, filed with the Clerk of this Court concurrently with the filing of this complaint, and incorporated by this reference herein.

XIII.

That each and all of the acts of defendants hereinbefore alleged in this complaint were done, committed and performed with full notice and knowledge of plaintiff's rights in the premises and without the authority or consent of plaintiff, and in deliberate violation of plaintiff's said rights, to plaintiff's damage generally in the sum of \$500,000.00, no part or portion of which has been paid to plaintiff, and the whole of which remains due, owing and unpaid to plaintiff.

Second Cause of Action

I.

Plaintiff hereby adopts and by this reference in-

corporate herein each and every allegation alleged and contained in paragraphs, I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XII of plaintiff's first cause of action, the same as if fully set forth at length herein. [8]

II.

That by reason of plaintiff's widespread use, performance and singing of his said original song and musical composition entitled "Where Is Your Heart" for more than thirty years last past, in hotels, nightclubs, theatres and places of entertainment throughout the world, thousands of persons in the entertainment industry and hundreds of thousands of persons constituting the general public have learned to identify plaintiff's said song and the title thereof with plaintiff, and a secondary meaning has attached thereto by which the entertainment industry generally and the general public has for more than thirty years last past identified the song and musical composition entitled "Where Is Your Heart" solely with the plaintiff herein.

III.

That by reason of defendants' acts hereinbefore alleged in this complaint, the entertainment industry and the general public has during the year 195 and continuously up to and including the date of filing this complaint, been confused and misled by defendants' acts aforesaid into the belief that plaintiff is not and never was the originator and creator of his own original song and musical composition entitled "Where Is Your Heart" (a copy of which

has been filed with the Clerk of this Court, marked Exhibit A), and plaintiff has thereby been deprived of all recognition and credit as the originator, creator and composer of said song and musical composition, and plaintiff has also been deprived and precluded by defendants' said acts from claiming rights of title or ownership in or to said song or musical composition or from publicly performing the same for profit. [9]

IV.

That by reason of the premises, defendants have continuously since on or about the 1st day of February, 1953, engaged in unfair competition with the plaintiff, by reason of the use, advertising and exploitation of the title of plaintiff's original song and musical composition entitled "Where Is Your Heart", to which a secondary meaning had previously attached and with which plaintiff had been previously identified, as hereinbefore alleged, in the minds of the entertainment industry and in the minds of the general public throughout the world.

V.

That by reason of the premises, plaintiff has been damaged in the further and additional sum of \$250,000.00, no part or portion of which has been paid to plaintiff by defendants and the whole of which remains due, owing and unpaid.

Third Cause of Action

I.

Plaintiff hereby adopts and by this reference in-

corporate herein each and every allegation alleged and contained in paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XII of plaintiff's first cause of action, and paragraphs II, III and IV of plaintiff's second cause of action, the same as if fully set forth at length herein.

II.

That defendants Romulus Films, Ltd. and United Artists Corporation threaten and intend to continue to release, distribute and exhibit said motion picture entitled "Moulin Rouge" to the general public, containing said song entitled "Where Is Your Heart", and each and every other defendant named in this complaint threatens and intends to do and perform the infringing [10] acts more particularly hereinbefore alleged in this complaint, unless restrained and enjoined from so doing by order and injunction of this Court.

III.

That unless defendants and each of them are enjoined and restrained from further use, performance and exploitation of said song and musical composition entitled "Where Is Your Heart" or "The Song From Moulin Rouge" hereinbefore identified as Exhibit B herein, plaintiff will suffer and continue to sustain irreparable injury and damage for which he has no adequate remedy at law.

IV.

That by reason of defendants' said acts of in-

fringement upon plaintiff's common law rights as hereinbefore alleged in this complaint, defendants and each of them have secured and will continue to secure each and all of the profits, benefits and privileges to which plaintiff is solely and exclusively entitled by reason of his ownership of said song and musical composition hereinbefore more specifically identified in this complaint, and by reason of the premises plaintiff is entitled to an accounting from each defendant named in this complaint as to each and all profits received or derived by said defendant by reason of such defendant's participation in said infringing acts aforesaid.

Wherefore, plaintiff prays for judgment against defendants as follows:

1. Upon plaintiff's first cause of action, for damages in the sum of \$500,000.00, together with plaintiff's costs of suit incurred herein. [11]
2. Upon plaintiff's second cause of action, plaintiff prays for damages in the sum of \$250,000.00, together with plaintiff's costs of suit incurred herein.
3. Upon plaintiff's third cause of action, plaintiff prays for an injunction perpetually restraining and enjoining the defendants from further acts of infringement upon plaintiff's common law rights and from further acts of unfair competition with plaintiff, and plaintiff further prays for an accounting of profits by each defendant named in this complaint as to all profits made by such defendant by reason of such defendant's participation in the acts

of infringement and unfair competition more particularly alleged in this complaint, together with plaintiff's costs of suit herein.

4. For such other, further and different relief as the Court shall deem just and proper.

FENDLER AND LERNER,
/s/ By HAROLD A. FENDLER,
Attorneys for Plaintiff

DEMAND FOR JURY TRIAL

Plaintiff hereby demands trial by jury upon each and every issue of fact raised by plaintiff's first and second causes of action, and by paragraph I of plaintiff's third cause of action.

FENDLER & LERNER,
/s/ By HAROLD A. FENDLER,
Attorneys for Plaintiff [12]

Duly Verified. [13]

[Endorsed]: Filed January 19, 1955.

[Title of District Court and Cause.]

MOTION TO DISMISS UNDER RULES 9 (f) and 12 (b) (6)

The defendants, Broadcast Music, Inc., a New York corporation, United Artists Corporation, a Delaware corporation, Columbia Broadcasting System, Inc., a New York corporation, Radio Corporation of America, a Delaware corporation, Capitol

Records Distributing Corp., a Delaware corporation, formerly known as Capitol Records Distributing Co., Inc., of California, and also formerly known as Capitol Records Distributing Co., Inc., of Georgia, and Columbia Records, Inc., formerly known as Columbia Recording Corporation, a Delaware corporation, (dissolved as of September 30, 1954 and since that date a part of Columbia Broadcasting System, Inc., a New York corporation) and each of them, individually, move the court as follows:

1. To dismiss the action pursuant to the provisions of Rules 9 (f) and 12 (b) (6) on the ground that the complaint fails to state a claim against the defendants, or any of them, upon which relief can be granted by reason of the fact that:

(a) It affirmatively appears on the face of said complaint that plaintiff has no property right in the alleged musical composition entitled "Where Is Your Heart" because said property is no longer in the possession of plaintiff inasmuch as plaintiff has made the same public and has, therefore, lost all rights therein under the laws of the state of California and particularly, California Civil Code Sections 980 and 983 as said code sections existed prior to December 23, 1952 and subsequent to 1922, and

(b) It affirmatively appears on the face of said complaint (as amended by stipulation) that plaintiff's alleged claim is barred by the Statutes of Limitations of the forum, to wit, California Code of Civil Procedure Section 339, Subdivision 1, and

(c) It affirmatively appears on the face of said complaint that defendants' musical composition entitled "The Song From Moulin Rouge" (copyright 1953 by Broadcast Music, Inc.) (Exhibit B, deposited with the Clerk) is so dissimilar to plaintiff's alleged musical composition "Where Is Your Heart", (Exhibit A deposited with the Clerk) both as to lyric and music that, as a matter of law, defendants' said musical composition does not infringe or violate any rights which plaintiff may have in said alleged musical composition entitled "Where Is Your Heart".

Said Motion is based upon all of the papers, documents, and pleadings on file in the above entitled matter, the Points and Authorities annexed hereto and by this reference made a part hereof, and upon such matters as defendants may, at the time of the hearing of said Motion, request the court to consider on the basis of Judicial notice.

Dated: April 5th, 1955.

LOYD WRIGHT,
CHARLES A. LORING,
WRIGHT, WRIGHT, GREEN &
WRIGHT,

/s/ By CHARLES A. LORING,
Attorneys for said Defendants

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 5, 1955.

[Title of District Court and Cause.]

STIPULATION RE AMENDMENT
OF COMPLAINT

Come now the plaintiff, Leo Mantin, and the defendants, Broadcast Music, Inc., a New York corporation, United Artists Corporation, a Delaware corporation, Columbia Broadcasting System, Inc., a New York corporation, Radio Corporation of America, a Delaware corporation, Capitol Records Distributing Corp., a Delaware corporation, formerly known as Capitol Records Distributing Co., Inc., of California, and Capitol Records Distributing Co., Inc., of Georgia, and Columbia Records, Inc., formerly known as Columbia Recording Corporation, a Delaware corporation, (dissolved as of September 30, 1954, and since that date a part of Columbia Broadcasting System, Inc., a New York corporation) through the undersigned, their attorneys of record, and stipulate that Paragraph VIII, page 5, of plaintiff's complaint herein shall be deemed amended to read as follows:

VIII.

That notwithstanding said notice and knowledge by defendants [19] of plaintiff's rights in the premises, defendant Romulus Films, Ltd., heretofore produced, and on or about the 23rd day of December, 1952, in conjunction with defendant United

Artists Corporation, first released and thereafter continuously since said date, during the years 1953, 1954 and 1955, to, until and including the date of filing this amendment to the complaint herein, said defendants distributed and caused to be exhibited in the County of Los Angeles, State of California, and continuously since February 1, 1953, said defendants released and caused to be exhibited in each and all of the other states of the United States, and elsewhere throughout the world, a motion picture photoplay entitled "Moulin Rouge", in which was incorporated and recorded a song entitled "Where Is Your Heart", sung by a character portrayed in said motion picture by Miss Zsa Zsa Gabor, and which song substantially copies and appropriates the words and music of plaintiff's original song and composition entitled "Where Is Your Heart", and said defendants have caused said song as an integral part of said motion picture photoplay to have been sung and performed as a part of each public exhibition of said motion picture photoplay within the State of California and elsewhere throughout the world, continuously during the years 1953, 1954 and 1955, to, until and including the date of filing this amendment herein.

Dated: April 12, 1955.

LOYD WRIGHT,
CHARLES A. LORING,
WRIGHT, WRIGHT, GREEN &
WRIGHT,

/s/ By CHARLES A. LORING,
Attorneys for Defendants, Broadcast Music, Inc., a
New York corporation; United Artists Cor-
poration, a Delaware corporation; Columbia
Broadcasting System, Inc., a New York cor-
poration; Radio Corporation of America, a
Delaware corporation; Capitol Records Dis-
tributing Corp., a Delaware corporation, form-
erly known as Capitol Records Distributing
Co., Inc., of California, and Capitol Records
Distributing Co., Inc., of Georgia, and Colum-
bia Records, Inc., formerly known as Columbia
Recording Corporation, a Delaware corpora-
tion.

FENDLER & LERNER,
/s/ By HAROLD A. FENDLER,
Attorneys for Plaintiff

It is so ordered.

Date: 4-18-55.

/s/ PEIRSON M. HALL,
Judge

[20]

[Endorsed]: Filed April 18, 1955.

[Title of District Court and Cause.]

AFFIDAVITS OF EXPERTS PAUL KERBY
AND WERNER JANSSEN, SUBMITTED
BY PLAINTIFF IN OPPOSITION TO DE-
FENDANTS' MOTION TO DISMISS [21]

AFFIDAVIT OF PAUL KERBY

State of California,
County of Los Angeles—ss.

Paul Kerby, being first duly sworn, deposes and says:

That he is a composer and conductor of music and that he has been so engaged for a period of thirty years last past; that he is the author of numerous published works and a member of the American Society of Composers, Authors and Publishers and an associate of the Royal Academy of Music of London.

That your deponent has examined the published copy in sheet music form of The Song From Moulin Rouge, alternate title Where Is Your Heart, of which Georges Auric and William Engvick are stated thereon as the writers of the music and lyrics, respectively, a copy of which sheet music is hereto annexed and marked Exhibit 1.

Deponent has also examined the manuscript of the song [22] written by the plaintiff, a copy of which is hereto attached marked Exhibit 2.

That your deponent is informed that the above named plaintiff contends that the manuscript which

is Exhibit 2 was written before the musical number contained in Exhibit 1. Upon that assumption, The Song From Moulin Rouge (alternate title Where Is Your Heart) is in the opinion of your deponent copied note for note, with slight variations or exceptions, from the song which is shown on Exhibit 2, and in the opinion of your deponent the song which is Exhibit 1 could not have been originally produced or written without recourse to the song which is Exhibit 2. That the similarity between the two songs as disclosed by the exhibits is in the opinion of your deponent so complete as to preclude the possibility of coincidence.

Dated at Los Angeles this 9th day of June 1955.

/s/ PAUL KERBY

Subscribed and sworn to before me this 9th day of June, 1955.

[Seal] /s/ GERTRUDE CASTY,
Notary Public in and for said
County and State. [23]

AFFIDAVIT OF WERNER JANSSEN

State of California,
County of Los Angeles—ss.

Werner Janssen, being first duly sworn, deposes and says:

That he is a conductor and director of symphony orchestras by profession and has been so engaged for upwards of twenty-five years last past; that

your deponent has variously conducted symphony orchestras in Europe, New York and Los Angeles; that your deponent's most recent appearances in 1955 were as conductor of the Symphony of the Air in Carnegie Hall, New York.

That your deponent has heard the song entitled The Song From Moulin Rouge (alternate title Where Is Your Heart), produced in the motion picture production "John Huston's Moulin Rouge," and has seen the publication thereof in sheet music form bearing the [24] publisher's name, "Broadcast Music, Inc., 580 Fifth Avenue, New York 36, N. Y." The copy exhibited to your deponent bore the marking "Music by Georges Auric, Lyrics by William Engvick."

Your deponent compared the printed music, of which an exact copy is hereto annexed marked Exhibit 1, with the song as recorded with the said motion picture photoplay and as reproduced from the sound record synchronized therewith, and found the song so recorded to be identical with the words and music in the annexed copy.

That your deponent has compared the song so published and so recorded with the manuscript of a song written by the plaintiff, a photostat of said manuscript being attached hereto and marked Exhibit 2.

That the notes in Exhibit 1 are practically identical with the notes in the manuscript copy which is Exhibit 2, with a difference in key, and the

words of Exhibit 1 bear a similarity to the words on Exhibit 2.

That the notes in Exhibit 1 being practically identical to the notes of Exhibit 2, your deponent is of the opinion that Exhibit 1 could hardly have been originally composed, assuming, as your deponent is informed, that Exhibit 2 was composed before Exhibit 1.

That the music contained in Exhibit 2, in the opinion of your deponent, is an original composition not copied or adapted from any other work and is not reminiscent of any other melody or musical composition known to your deponent.

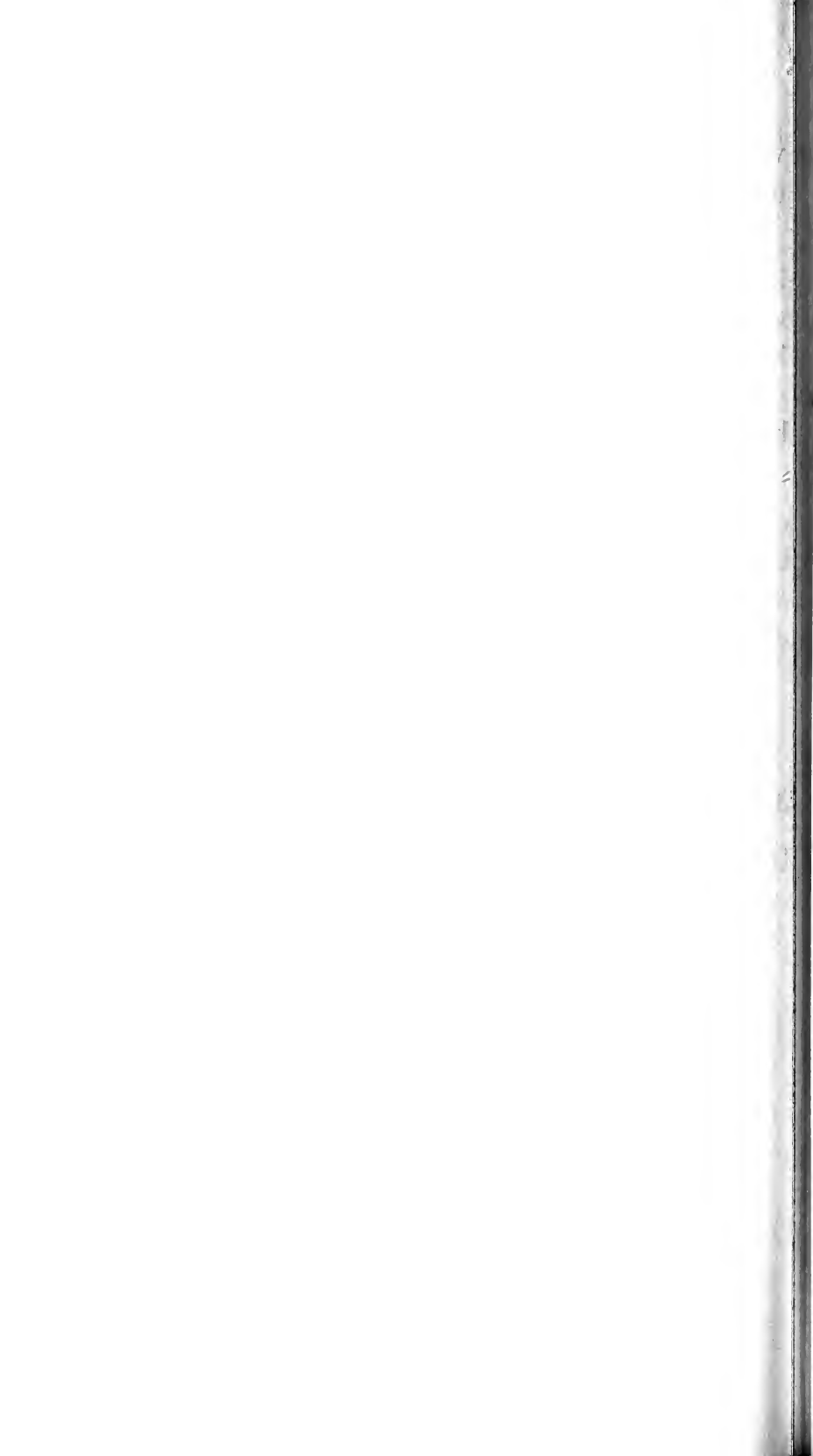
/s/ WERNER JANSSEN

Subscribed and sworn to before me this 7th day of June 1955.

[Seal] /s/ RUTH MEYERS,
Notary Public in and for said
County and State

Affidavit of Service by Mail attached. [31]

[Endorsed]: Filed June 13, 1955.

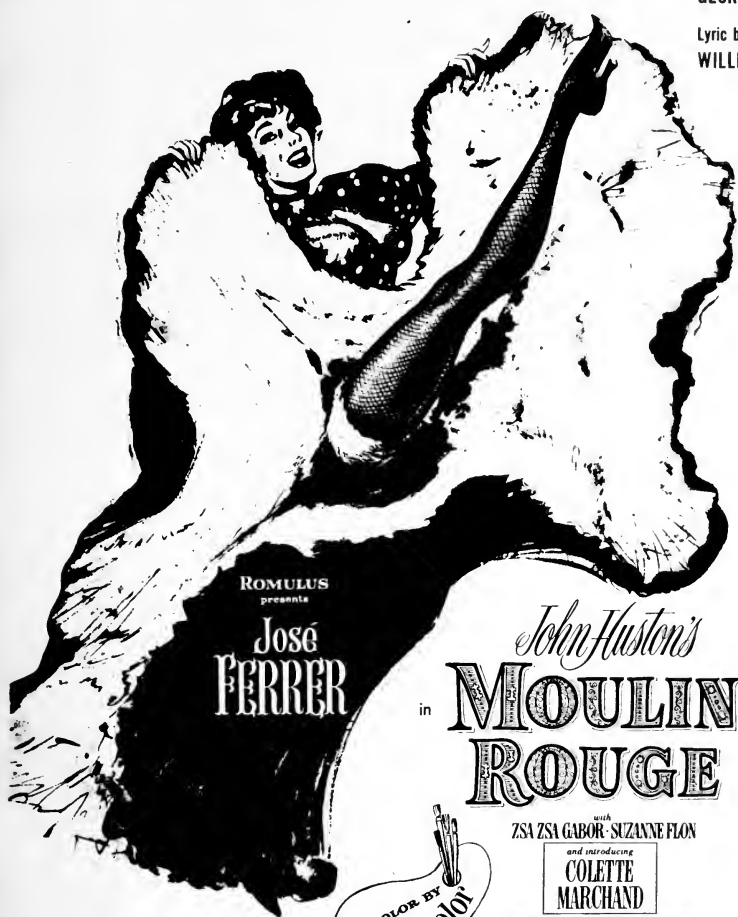


THE SONG FROM MOULIN ROUGE

(WHERE IS YOUR HEART)

Music by
GEORGES AURIC

Lyric by
WILLIAM ENGVIK



ROMULUS
presents

José
FERRER

John Huston's
in **MOULIN
ROUGE**

with
ZSA ZSA GABOR • SUZANNE FLON

and introducing
**COLETTE
MARCHAND**

A ROMULUS PRODUCTION • Directed by JOHN HUSTON
Screenplay by Anthony Veiller and John Huston
From the novel "MOULIN ROUGE" by PIERRE LA MURE
Released thru United Artists

PRICE
60c
(In U. S. A.)

COLOR BY
Technicolor

BROADCAST MUSIC, INC. • 589 FIFTH AVENUE • NEW YORK 17, N. Y.

EXHIBIT 1.



The Song From Moulin Rouge

(Where Is Your Heart)

Lyric by
WILLIAM ENGWICK

Music by
GEORGES AURIC

Moderato

The piano introduction begins with a series of chords in the right hand and a melodic line in the left hand. The tempo is marked 'Moderato' and the dynamics are 'mp' (mezzo-piano) and 'rall.' (ritardando).

When - ev - er we kiss, I wor - ry and won - der... Your

lips may be near, but WHERE IS YOUR HEART? It's

al - ways like this, I wor - ry and won - der... You're close to me

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International Copyright Secured
All Rights Reserved Including Public Performance for Profit

25

3

here, but WHERE IS YOUR HEART? It's a sad thing to re - al -

ize that you've a heart that nev - er melts. When we kiss, do you close your

eyes, pre - tend - ing that I'm some - one else? You must break the

spell, this cloud that I'm un - der. So please won't you

tell, dar - ling, WHERE IS YOUR HEART? When HEART?

dim. e rall.

Where 2

EXHIBIT No. 2

dal segno - sign repeat.

"WHERE IS YOUR HEART"

(Music by Leo Mantin)



"WHERE IS YOUR HEART"

(Words by Leo Mantin)

I kiss you again, again and again dear

I kiss in my dreams - but Where is Your Heart?

Needless to hope, to scheme and to wonder

Confusion of mind is what keeps us apart;

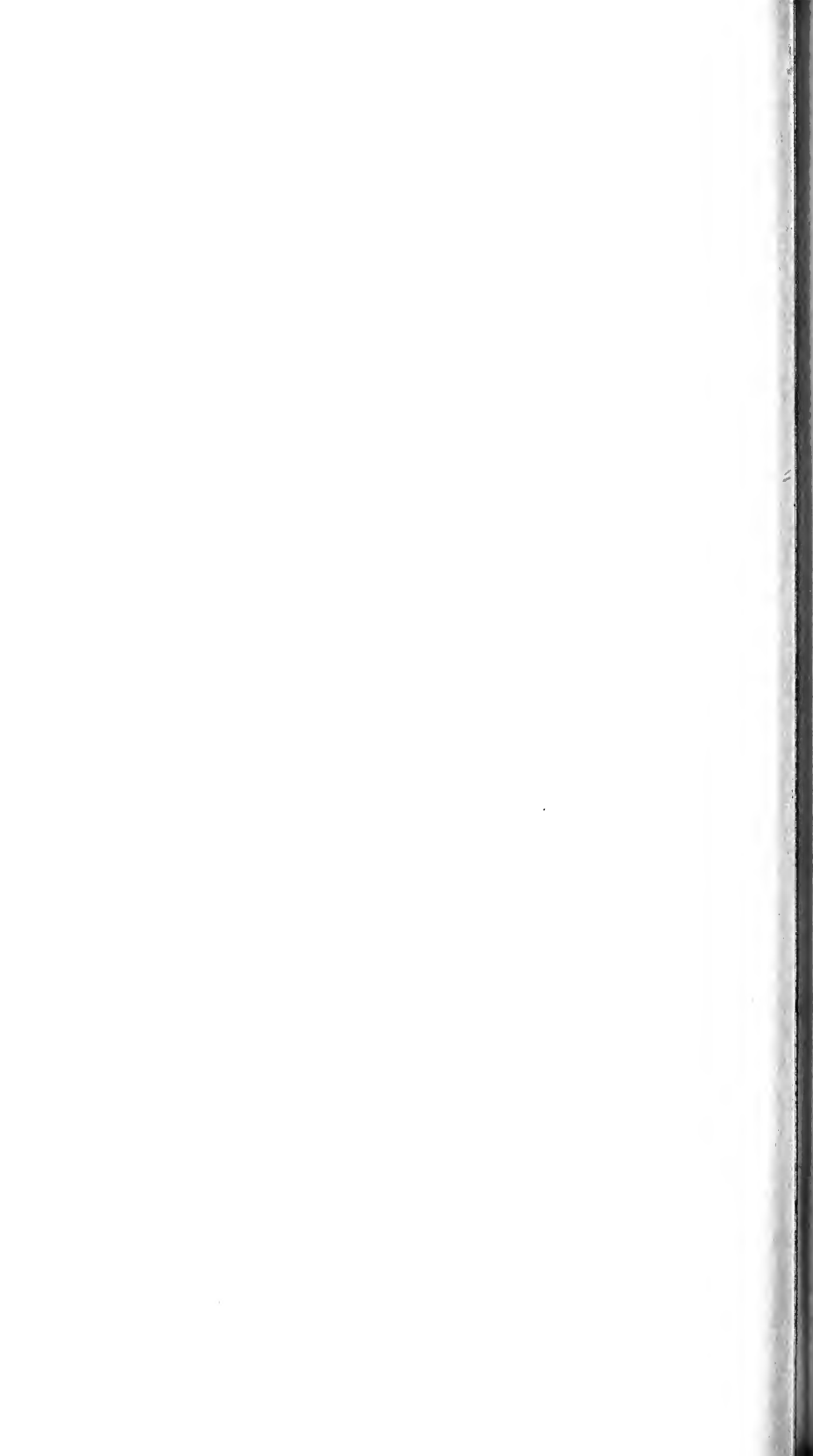
Every day, every night, the same is to repeat,

Maybe wrong or maybe right

But darling, have a heart dear.







In the Superior Court of the State of California in
and for the County of Los Angeles

No. 427556

JOHN ITALIANI,

Plaintiff,

vs.

METRO-GOLDWYN-MAYER CORPORATION,
a corporation, LOEW'S, INCORPORATED, a
corporation, JOHN DOE, JANE DOE, RICH-
ARD ROE, DOE COMPANY, a corporation,
and ROE COMPANY, a corporation,

Defendants.

COMPLAINT FOR DAMAGES FOR MISAP-
PROPRIATION OF LITERARY PROPERTY
AND FOR ACCOUNTING OF PROFITS

Plaintiff complains of the defendants, and each
of them, and for cause of action alleges:

I.

That plaintiff is a resident of the County of Los
Angeles, State of California.

II.

That the defendant, Metro-Goldwyn-Meyer, a cor-
poration, is a corporation duly organized and exist-
ing under and by virtue of the laws of the State of
New York and is duly authorized to do business,
and is actually doing business in the State of Cali-
fornia in the County of Los Angeles.

III.

That the defendant, Loew's, Incorporated, a corporation, is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and is duly authorized to do business, and is actually doing business in the State of California in the County of Los Angeles.

IV.

That the defendants John Doe, Jane Doe, Richard Roe, Doe Company, a corporation, and Roe Company, a corporation, are sued [50] herein under fictitious names for the reason that their true names are unknown to the plaintiff, and when and if such true names are ascertained, plaintiff will ask leave of court to amend this complaint so as to insert therein the true names of said defendants.

V.

That at all times herein mentioned, plaintiff was and now is an author and writer, and prior to the 1st day of February, 1933, invented, originated, composed and wrote a certain original literary composition and moving picture scenario entitled "Johnny of the Circus"; and at all times since said date, and at all times herein mentioned, said plaintiff has retained said literary composition and moving picture scenario in manuscript form and has not published or dedicated the same in any manner whatsoever, and plaintiff has not consented to the use of said literary composition and moving picture scenario, or any part or portion thereof, by any person or by any firm whatsoever, and at all times

herein mentioned, and at the present time, plaintiff herein retains all of the common law literary rights and all other rights therein and thereto.

VI.

That during the month of June, 1933, the plaintiff submitted the above mentioned literary composition and moving picture scenario entitled "Johnny of the Circus" to the defendant, Metro-Goldwyn-Mayer Corporation, a corporation, by and through its respective officers, agents, servants and employees; that said defendant corporation, by and through its respective officers, agents, servants and employees, read and examined said literary composition and moving picture scenario for a sufficient time to accomplish said reading and examination notified plaintiff that said literary composition and moving picture scenario, and after retaining said literary composition and moving picture scenario for a sufficient time to accomplish said reading and examination notified plaintiff that said literary composition and moving picture scenario was unsuitable for its use, and rejected it, and on or about the 17th day of August, 1933, returned the same to plaintiff herein. [51]

VII.

Plaintiff is informed and believes, and upon such information and belief alleges that the defendants, and each of them, without the knowledge, consent or authority of or from the plaintiff, during the latter part of the year 1933, and continuously to and including the present time, did deliberately and

unlawfully copy and appropriate plaintiff's said literary composition and moving picture scenario, and said defendants did, for profit, reproduce, sell, distribute and exhibit the same in a sound and talking motion picture photoplay entitled and designated "O'Shaughnessy's Boy." That defendants, and each of them, hold, use and represent to the public in advertising, publicity upon the screen, and otherwise, that said motion picture photoplay entitled "O'Shaughnessy's Boy" is fully original with them and is their sole and exclusive property; but in truth and in fact said motion picture photoplay entitled "O'Shaughnessy's Boy" copies, appropriates and embodies plaintiff's said literary composition and moving picture scenario entitled "Johnny of the Circus", and defendants, and each of them, have inextricably intermingled the same with other literary matter not found in plaintiff's said literary composition and moving picture scenario herein referred to, but which defendants have cunningly and shrewdly combined therewith.

VIII.

That defendants, and each of them, released, exhibited and distributed said motion picture photoplay entitled "O'Shaughnessy's Boy" during the latter part of the year 1935, and that plaintiff, during the latter part of the year 1936, saw the said motion picture photoplay in the City of Los Angeles, State of California, and that on or about the 1st day of December, 1936, plaintiff herein notified and advised the defendants that they would be held

responsible for all damages resulting from the unlawful and unauthorized use of plaintiff's said literary composition and moving picture scenario; [52] that plaintiff is informed and believes, and upon such information and belief alleges the facts to be that immediately upon receipt of said notice, the said defendants took said motion picture photoplay, entitled "O'Shaughnessy's Boy", off schedule in the southern part of the State of California, but notwithstanding said notice, defendants continue to release, distribute and exhibit said motion picture photoplay throughout other parts of the world.

IX.

That plaintiff is informed and believes, and upon such information and belief alleges that the defendant, Metro-Goldwyn-Mayer Corporation, a corporation, received large sums of money as profits from the sale, lease and distribution of the film of the said motion picture photoplay, the exact amount being to the plaintiff unknown; but plaintiff is informed and believes, and upon such information and belief alleges that the said profits were in excess of \$1,000,000.00.

X.

That plaintiff is informed and believes, and upon such information and belief alleges that the defendant, Loew's, Incorporated, a corporation, received large sums of money as profits from the release and distribution of the said motion picture, the exact amount being to the plaintiff unknown, but that plaintiff is informed and believes, and upon such

information and belief alleges that said profits were in excess of \$1,000,000.00.

XI.

That when the exact amount of said profits so realized by each and all of the defendants is ascertained, plaintiff will pray leave of court to insert such exact amounts in place of the amounts hereinbefore alleged.

XII.

That prior to the plagiarizing, pirating and adopting of said original literary composition and moving picture scenario, [53] entitled "Johnny of the Circus", the said literary composition and moving picture scenario had an actual value of \$100,000.00 for use as a basis for a motion picture photoplay. That by reason of the unauthorized use of the said literary composition and moving picture scenario in the making and presentation of the said motion picture photoplay, entitled "O'Shaughnessy's Boy", as aforesaid, the said literary composition and moving picture scenario, entitled "Johnny of the Circus", has become valueless for use in making and presenting a motion picture photoplay.

That solely as a result of the plagiarizing, pirating and adapting of the said literary composition and moving picture scenario by the defendants, as aforesaid, the plaintiff has been damaged in the sum of \$100,000.00.

XIII.

That by reason of the premises, the plaintiff has been deprived of international screen and literary

credits and reputation and has been deprived of the exclusive, rights, privileges and profits to which he is entitled as the author and owner of said original literary composition and moving picture scenario, entitled "Johnny of the Circus".

XIV.

Plaintiff is informed and believes, and upon such information and belief alleges that each and all of the acts and conduct of the defendants, and each of them, hereinabove set forth were and are wrongful, malicious, oppressive and deliberately contrived and designed to cheat and defraud the plaintiff of and from screen credit, reputation and all other of his said rights, privileges and profits in and to the said original literary composition and motion picture scenario entitled "Johnny of the Circus".

Wherefore, plaintiff prays judgment against the defendants, and each of them, as follows:

1. For his damage in the sum of \$100,000.00;
2. For an accounting of all profits which the defendants, and each of them, have made by reason of the acts herein alleged;
3. For such other and further relief as to the court may seem just and equitable.

/s/ ARTHUR WEBB,

/s/ WALLACE COLLINS,

Attorneys for Plaintiff [55]

Duly Verified. [56]

County Clerk's Certification of True Copy attached.

[Title of Superior Court and Cause No. 427,556.]

AMENDED COMPLAINT FOR DAMAGES FOR
MISAPPROPRIATION OF LITERARY
PROPERTY AND FOR ACCOUNTING OF
PROFITS

Comes now plaintiff and by leave of court first had and obtained files this, his amended complaint, and for cause of action against the defendants and each of them alleges:

[Printer's Note: The Amended Complaint is the same as the Complaint set out at pages 27-33 except for paragraph VII which follows.]

* * * * *

VII.

That at and in the County of Los Angeles, State of California, within three years of the filing of this complaint, plaintiff is informed and believes and upon such information and belief alleges that the defendants and each of them, without the knowledge, consent or authority of or from the plaintiff, and continuously during said time, did deliberately and unlawfully appropriate and convert to their own use plaintiff's said literary composition and moving picture scenario and said defendants did, for a profit, reproduce, sell, distribute and exhibit the same in a sound and talking motion picture photoplay entitled and designated "O'Shaughnessy's Boy". That defendants, and each of them, hold, use and represent to the public in advertising, publicity

upon the screen and otherwise that said motion picture photoplay entitled "O'Shaughnessy's Boy" is fully original with them and is their sole and exclusive property, but in truth and in fact the said motion picture photoplay entitled "O'Shaughnessy's Boy" copies, appropriates and embodies plaintiff's said literary composition and moving picture scenario entitled "Johnny of the Circus" and defendants and each of them have inextricably intermingled the same with other literary matters not found in plaintiff's said literary composition and moving picture scenario herein referred to, but which defendants have cunningly and shrewdly combined therewith. [59]

* * * * *

Affidavit of Service by Mail attached. [63]

Additional Certificate (17 U.S.C. 215)

Class Exxx. No. 518734

Copyright Office of the United States of America
The Library of Congress : Washington

**CERTIFICATE OF COPYRIGHT
REGISTRATION**

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright, approved March 4, 1909, as amended by the Act approved March 2, 1913, that One copy of the musical composition named herein, not reproduced for sale, has been deposited in this Office under the provisions of the Act of 1909, and

that registration of a claim to copyright for the first term of twenty-eight years has been duly made in the name of James A. Webb, R.R. 3, Lithonia, Ga.

Title: The Soldier's Plea, or, Where Is Your Heart? Words by James A. Webb. Music by Pauline B. Story, of United States. (Words and melody).

Copy received Aug. 30, 1921.

[Seal] /s/ ARTHUR (Illegible),
Register of Copyrights [64]

Additional Certificate (17 U.S.C. 215)

Class E unp. No. 49787

Copyright Office of the United States of America
The Library of Congress : Washington

CERTIFICATE OF COPYRIGHT
REGISTRATION

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright, approved March 4, 1909, as amended by the Act approved March 2, 1913, that One copy of the musical composition named herein, not reproduced for sale, has been deposited in this Office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of twenty-eight years has been duly made in the name of Donn Heyward Marsh, 420 So. Illinois St., Villa Park, Ill.

Title: Where Is Your Heart? Words and music by Donn Marsh, (Donn Heyward Marsh), of United States.

Copy received Jan. 6, 1932 (Photoprt.)

[Seal] /s/ ARTHUR (Illegible),
Register of Copyrights [65]

Additional Certificate (17 U.S.C. 215)

Class E unp. No. 135744

Copyright Office of the United States of America
The Library of Congress : Washington

CERTIFICATE OF COPYRIGHT
REGISTRATION

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright, approved March 4, 1909, as amended by the Act approved March 2, 1913, that One copy of the musical composition named herein, not reproduced for sale, has been deposited in this Office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of twenty-eight years has been duly made in the name of Randall McClelland, 902 South Marengo St., Pasadena, California.

Title: Where Is Your Heart. Words-Music by Randall McClelland, of United States. (Words and melody).

Copy received Nov. 27, 1936.

[Seal] /s/ ARTHUR (Illegible),
Register of Copyrights [66]

Additional Certificate (17 U.S.C. 215)

Class E unp. No. 140536

Copyright Office of the United States of America
The Library of Congress : Washington

CERTIFICATE OF COPYRIGHT
REGISTRATION

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright, approved March 4, 1909, as amended by the Act approved March 2, 1913, that One copy of the musical composition named herein, not reproduced for sale, has been deposited in this Office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of twenty-eight years has been duly made in the name of Sylvester Long Cross, 607 Studio Bldg., Portland, Oregon.

Title: Where Is Your Heart? Words by Ida Lowe Ailiff. Music by Sylvester Long Cross, of United States. (Piano with words)

Copy received Feb. 19, 1937.

[Seal]

/s/ ARTHUR (Illegible),

Register of Copyright

[67]

Additional Certificate (17 U.S.C. 215)

Class E unp. No. 197987

Copyright Office of the United States of America
The Library of Congress : Washington

CERTIFICATE OF COPYRIGHT
REGISTRATION

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright, approved March 4, 1909, as amended by the Act approved March 2, 1913, that One copy of the musical composition named herein, not reproduced for sale, has been deposited in this Office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of twenty-eight years has been duly made in the name of Thomas Gordon Dennis, Canfield Rd., Convent, N. J.

Title: Where Is Your Heart? Words and music by Thomas Gordon Dennis, of United States.

Copy received June 30, 1939.

[Seal]

/s/ ARTHUR (Illegible),

Register of Copyright

[68]

Additional Certificate (17 U.S.C. 215)

Class E unp. No. 209074

Copyright Office of the United States of America
The Library of Congress : Washington

CERTIFICATE OF COPYRIGHT
REGISTRATION

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright, approved March 4, 1909, as amended by the Act approved March 2, 1913, that One copy of the musical composition named herein, not reproduced for sale, has been deposited in this Office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of twenty-eight years has been duly made in the name of Richard Cameron Carder, 2107 Fairmount Ave., Philadelphia, Pa.

Title: Where's Your Heart? Words and music by "Dick Carder" (Richard Cameron Carder), of United States. (Words and melody.)

Copy received Nov. 24, 1939.

[Seal] /s/ ARTHUR (Illegible),
Register of Copyright [69]

Additional Certificate (17 U.S.C. 215)

Class E unp. No. 74528

CERTIFICATE OF REGISTRATION

of a Claim to Copyright in a Musical Composition
This Is To Certify that the following statements

for the work herein named have been made a part of the records of the Copyright Office. In witness whereof the seal of the Copyright Office is hereto affixed.

[Seal] /s/ Arthur (Illegible)

Register of Copyrights, United States of America

1. Copyright Claimant or Claimants: Beryl Helen Rodrigue (Mrs. Richard R. Rodrigue), 2131 Audubon St., New Orleans, La.

2. Title of Musical Composition: Where Is Your Heart?

3. Composers, Authors, Etc. Full name, pseudonym, if any, year of birth and designation of authorship (such as music, words, arrangement, etc.) are requested for cataloging purposes. Citizenship must be given.

(a) Name: Beryl Helen Rodrigue. Citizenship: U. S. Pseudonym: Where Can It Be? Original in Key of 'G'. Nature of Authorship: Where Is Your Heart? Domicile: 2131 Audubon St., New Orleans, La. Birth: 1913.

* * * * *

4. Send Certificate to: Mrs. Richard R. Rodrigue, 2131 Audubon St., New Orleans 18, Louisiana.

Dates of Receipt in Copyright Office: Application: May 9, 1947. One Copy: May 9, 1947. [70]

* * * * *

Additional Certificate (17 U.S.C. 215)

Class E pub. No. 69688 E

CERTIFICATE OF REGISTRATION

of a Claim to Copyright in a Musical Composition

This Is To Certify that the following statements for the work herein named have been made a part of the records of the Copyright Office. In witness whereof the seal of the Copyright Office is hereto affixed.

[Seal] /s/ Arthur (Illegible),

Register of Copyrights, United States of America

1. Copyright Claimant or Claimants: Broadcast Music, Inc., 580 Fifth Avenue, New York 36, N. Y.

2. Title of Musical Composition: The Song From Moulin Rouge (Where Is Your Heart).

3. Composers, Authors, Etc. Full name, pseudonym, if any, year of birth and designation of authorship (such as music, words, arrangement, etc.) are requested for cataloging purposes. Citizenship must be given.

(a) Name: William Engvick. Citizenship: U.S.A. Pseudonym: Author of words. Domicile: Stony Point, New York. Birth:

(b) Name: Georges Auric. Citizenship: France. Pseudonym: Author of music. Domicile: Paris, France. Birth:

* * * * *

4. Send Certificate to: Leonard S. Mietus (Index) Broadcast Music, Inc., 580 Fifth Avenue, New York 36, N. Y.

* * * * *

6. For Published Works Only: (Date first placed on sale, sold, or publicly distributed). Fill in either (a) or (b):

(a) If first published in the United States: February 6, 1953.

* * * * *

Dates of Receipt in Copyright Office: Application: Feb. 20, 1953. Two Copies: Feb. 20, 1953.

[Title of District Court and Cause.]

PLAINTIFF'S OBJECTIONS TO PROPOSED ORDER OF DISMISSAL

Now Comes the plaintiff and files the following written detailed statement of his objections to defendants' proposed "Judgment of Dismissal on Merits for Failure to State a Ground Upon Which Relief Can Be Granted", together with his reasons therefor, pursuant to Rule 7 of the local rules of the United States District Court for the Southern District of California, to-wit:

Objections to Form and Content of Paragraph Numbered "3" (Page 2, Lines 19-28).

1. The word "published" (page 2, line 22) is misused and misinterpreted. "Publication" without the knowledge, authority or consent of plaintiff could not divest plaintiff of his common-law copyrights. The judgment implies voluntary [102] publication with plaintiff's consent. Any involuntary

publication by one defendant could not possibly benefit either such defendant or any other defendant engaging in independent successive and different acts of infringement upon the various exclusive, independent, common-law rights owned by plaintiff such as (1) his sole right of performance, (2) his sole right to publish sheet music, (3) his sole right to manufacture and sell phonograph record, (4) his sole right to broadcast by radio, (5) his sole right to license for use in motion pictures, (6) his sole right to license use on television, etc.

2. There is no allegation in the complaint concerning "publication by the defendant United Artists Corporation." Paragraph IX (page 5, line 21) alleges that "during the year 1953 * * * defendant Broadcast Music, Inc. published or caused to be published said song", but plaintiff presented to the Court said defendant's certificate of copyright registration upon said song, Class No. E 69668, reciting the date such song was "first placed on sale, sold, or publicly distributed" as February 6, 1953 (less than two years prior to the commencement of the action). Plaintiff's causes of action against defendant Broadcast Music, Inc. were not and could not be barred by the provisions of the California Statute of Limitations, Code of Civil Procedure Section 399, subdivision 1, for the reason that no cause of action of any nature arose as to said defendant more than two years prior to the commencement of the within action. Plaintiff could not have filed suit against defendant Broadcast Music,

Inc. prior to the date said defendant published said music in sheet music form and prior to the date said defendant licensed performance by others, because no liability for infringement by said defendant had been created or incurred and no cause of action could arise until infringing acts were committed by said defendant [103] Broadcast Music, Inc.

3. The first date of infringement upon plaintiff's rights by manufacture, sale and distribution of phonograph records is alleged in paragraph X of the first cause of action of the complaint (page 6, line 2) to have commenced on or about February 1, 1953, by the defendant record companies, including defendant Radio Corporation of America, defendant Capitol Records Distributing Corporation, and defendant Columbia Records, Inc. Each act alleged to have been committed by each of these defendants was within two years prior to the commencement of the action. No action for infringement could have been commenced against any of these defendants prior to their respective invasions of plaintiff's rights, or prior to the date any of said defendants manufactured, sold or distributed the first phonograph record containing defendants' infringing song.

4. Plaintiff's causes of action against defendant Columbia Broadcasting System, Inc. and the other radio network defendants for performance and broadcast of defendants' infringing song over their network facilities, is alleged to have commenced "on

or about the first day of February, 1953, up to and including the date of filing this complaint" (Complaint, page 6, paragraph XI, line 19). Plaintiff could claim no cause of action against any of these network defendants prior to the date of commission of any infringing act by any of said defendants. Each of said infringing acts is affirmatively alleged to have taken place within two years prior to the commencement of the action. The statute of limitations is therefore inapplicable to these defendants.

Objections to Conclusions of Law and Order
(Page 3, Lines 2-9)

1. No portion of plaintiff's first cause of action is barred as to any defendant except United Artists Corporation. As to such defendant, plaintiff's cause of action for damages and profits is barred only with respect to those exhibitions and such distribution as occurred prior to January 19, 1953 within the State of California. A motion to dismiss is inapplicable as to such portion of such cause of action. Said defendant's remedy is by pleading a separate, affirmative defense to such portion of plaintiff's causes of action against defendant United Artists Corporation as allege damages and profits arising prior to January 19, 1953.

2. Even assuming the California statute of limitations is applicable to the defendant United Artists Corporation with respect to infringing acts within the State of California prior to January 19, 1953, it is inapplicable to causes of action arising in

the other forty-seven states of the United States since February 1, 1953, upon which date the complaint, as amended by stipulation, alleges that said defendant "released and caused to be exhibited in each and all of the other states of the United States and throughout the world" said motion picture photoplay containing said infringing song. In no event should this action be dismissed with prejudice or on the merits as to causes of action arising in other states at times and under circumstances when they would not be barred either by the California statute of limitations or by the statutes of limitations in such other states. There is no present showing as to what such statutes provide and the motion to dismiss is not based thereon. [105]

3. Plaintiff's second cause of action affirmatively alleges that "defendants have continuously since on or about the 1st day of February, 1953, engaged in unfair competition with the plaintiff" (Complaint, paragraph IV, page 9, lines 1-4). Separate, independent acts of unfair competition committed by each and all of said defendants is not barred by the California statute of limitations, nor is there any showing of any statutory bar in any other state, with respect to acts committed since January 19, 1953.

4. Plaintiff's third cause of action is to enjoin future infringements which are threatened and intended by each and every defendant named (Complaint, paragraph II, page 9, line 26). No statute of limitations can bar infringements which have not

occurred, but which are threatened and intended to occur in the future.

Respectfully submitted,

FENDLER & LERNER,
/s/ By HAROLD A. FENDLER,
Attorneys for Plaintiff [106]

Affidavit of Service by Mail attached. [107]

[Endorsed]: Filed September 27, 1955.

In the United States District Court for the Southern District of California, Central Division

No. 17785-PH

LEO MANTIN, Plaintiff,
vs.

BROADCAST MUSIC, INC., a New York corporation, et al., Defendants.

JUDGMENT OF DISMISSAL ON MERITS
FOR FAILURE TO STATE A GROUND
UPON WHICH RELIEF CAN BE GRANTED
(STATUTE OF LIMITATIONS)

This matter came on for hearing this 19th day of September, 1955 before the above entitled Court, the Honorable Peirson M. Hall, Judge presiding, on the Motion of the Defendants Broadcast Music, Inc., a New York corporation; United Artists Corporation, a Delaware corporation; Columbia Broadcasting System, Inc., a New York corporation;

Radio Corporation of America, a Delaware corporation; Capitol Records Distributing Corp., a Delaware corporation, formerly known as Capitol Records Distributing Co., Inc., of California, and Capitol Records Distributing Co., Inc., of Georgia, and Columbia Records, Inc., formerly known as Columbia Recording Corporation, a Delaware corporation to dismiss the action pursuant to Rules 9 (f) and 12 (b) (6) for failure to state a claim against the defendants or any of them upon which relief can be granted; Messrs. Wright, Wright, Green and Wright, Loyd Wright and Charles A. Loring by Charles A. Loring, Esquire [108] appearing as counsel for the moving defendants and Harold A. Fendler, Esquire appearing as counsel for plaintiff; said Motion having been fully argued and submitted to the Court for decision and the Court being fully advised in the premises; the Court finds that:

1. The musical composition of the defendants' entitled the "Song From Moulin Rouge" ("Where Is Your Heart") is sufficiently similar to the musical composition of the plaintiff "Where Is Your Heart" insofar as the pleadings in this case only are concerned to support a claim in favor of plaintiff for infringement. This finding shall not constitute an adjudication of said issue upon the merits but only so far as this Motion is concerned.

2. The plaintiff has not published his musical composition within the meaning of the law of the State of California so as to lose his rights therein and dedicate the same to the public. This finding is

a finding only insofar as this Motion is concerned and shall not constitute an adjudication on the merits.

3. It appears from the pleadings as amended by Stipulation that the defendants' musical composition entitled "Song From Moulin Rouge" ("Where Is Your Heart") was first published by the defendant, United Artists Corporation, on December 23, 1952, more than two years prior to the commencement of the within action and that plaintiff's causes of action and each of them, if any, against the defendants, and each of them, are barred by the Statute of Limitations of the State of California, to-wit: By the provisions of California Code of Civil Procedure Section 399 Subdivision 1.

From such findings the Court concludes that the Motion of the defendants, and each of them, to dismiss plaintiff's Complaint herein on the ground that it fails to state a claim upon which relief can be granted pursuant to the provisions of Federal [109] Rule 9 (f), 12 (b) (6) in that plaintiff's said causes of action, and each of them, if any, are barred by the Statute of Limitations of the State of California, to-wit: By the terms and provisions of California Code of Civil Procedure Section 339 Subdivision 1, should be and the same is hereby granted.

It Is Ordered, Adjudged and Decreed that the above entitled action be and it is hereby dismissed as of this date on the merits with prejudice for failure to state a claim upon which relief can be granted.

Dated: May 10th, 1956.

By the Court.....

/s/ PEIRSON M. HALL,
Judge U.S.D.C.S.D.

Not approved as to form:

FENDLER & LERNER,
/s/ By HAROLD A. FENDLER,
Attorneys for Plaintiff [110]

[Endorsed]: Filed May 10, 1956. Docketed and
Entered May 14, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Leo Mantin, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the "Judgment of Dismissal on Merits for Failure to State a Ground Upon Which Relief Can Be Granted (Statute of Limitations)", entered in this action on May 14, 1956.

Dated: This 4th day of June, 1956.

FENDLER & LERNER,
HAROLD A. FENDLER and
ROBERT W. LERNER,
/s/ By HAROLD A. FENDLER,
Attorneys for Plaintiff, Leo Mantin

Affidavit of Service by Mail attached. [112]

[Endorsed]: Filed June 6, 1956.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Now comes appellant and files the following statement of his points on appeal:

1. The Court erred in granting the judgment of dismissal herein, and said judgment is contrary to law.

2. The Court erred in concluding that the motion of defendants-appellees, and each of them, to dismiss plaintiff's complaint should be granted, and the order granting the same is contrary to law.

3. The Court erred in failing to sustain each of plaintiff-appellant's objections to said judgment of dismissal and the findings and conclusions contained therein, for each of the reasons [113] and upon each of the grounds stated therein.

4. No cause of action stated in plaintiff's complaint is barred by any statute of limitations as to any of the defendants-appellees herein.

Dated: This 8th day of June, 1956.

FENDLER & LERNER,
HAROLD A. FENDLER and
ROBERT W. LERNER

/s/ By HAROLD A. FENDLER,
Attorneys for Plaintiff-
Appellant

Acknowledgment of Service attached. [114]
[Endorsed]: Filed June 8, 1956.

[Title of District Court and Cause.]

STIPULATION AS TO RECORD ON APPEAL

It Is Hereby Stipulated and Agreed by and between the above named parties, through their respective counsel, that the record on appeal shall consist of the following:

1. The complaint filed January 19, 1955, including Exhibits "A" and "B", filed with the Clerk of this Court.

2. Stipulation re amendment to complaint, dated April 12, 1955.

3. Defendants' "Motion to Dismiss Under Rules 9 (f) and 12 (b) (6)". (Omit "Notice of Motion" and "Points and Authorities in Support of Motion".) [115]

4. Plaintiff's objections to proposed order of dismissal.

5. Judgment of dismissal entered May 14, 1956.

6. Notice of appeal.

7. Statement of points on appeal.

8. Certificate of Registration of copyright numbered E pub. 69688 E, issued to defendant Broadcast Music, Inc., and all exhibits attached to defendants' closing memorandum of points and authorities in support of defendants' motion to dismiss, including complaint and amended complaint for damages in Superior Court action numbered 427556, entitled "John Italiani, Plaintiff vs. Metro-Goldwyn-Mayer Corporation, et al., Defendants", and certificates of copyright registration respectively num-

bered 518734, 49787, 135744, 140536, 197987, 209074 and 74528, each of which contain a title or alternate title "Where Is Your Heart?"

9. Affidavits of Paul Kerby and Werner Janssen.

10. This stipulation as to record on appeal.

Dated: This 27th day of June, 1956.

FENDLER & LERNER

HAROLD A. FENDLER and

ROBERT W. LERNER,

/s/ By HAROLD A. FENDLER,

Attorneys for Plaintiff-Appellant

LOYD WRIGHT,

CHARLES A. LORING,

WRIGHT, WRIGHT, GREEN &

WRIGHT,

/s/ By DUDLEY K. WRIGHT,

Attorneys for Defendants-Appellees

[Endorsed]: Filed July 9, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 116, inclusive, contain the original

Complaint;

Plaintiff's exhibits A and B;

Stipulation re Amendment of Complaint;

Affidavits of Paul Kerby and Werner Janssen;
Plaintiff's Objections to Proposed Order of Dis-
missal;

Judgment of Dismissal on Merits for Failure to
State a Ground upon which Relief can be granted;

Notice of Appeal;

Statement of Points on Appeal;

Stipulation as to Record on Appeal; and Certi-
ficate of Copyright Registration Nos. 518734, 49787,
135744, 140536, 197987, 209074 and 74528, which, to-
gether with a photostatic copy of Complaint and
Amended Complaint filed in the Superior Court for
the State of California, County of Los Angeles, Case
No. 427556; and a photostatic copy of Certificate
of Registration E pub. 69688 E; all in the above-
entitled cause, constitute the transcript of record on
appeal to the United States Court of Appeals for
the Ninth Circuit, in the above case.

I further certify that my fees for preparing the
foregoing record amount to \$2.00, which sum has
been paid by appellant.

Witness my hand and seal of the said District
Court this 11th day of July, 1956.

JOHN A. CHILDRESS,
Clerk

/s/ By CHARLES E. JONES,
Deputy

[Title of District Court and Cause.]

**CERTIFICATE OF FINALITY UNDER RULE
54(b) (NUNC PRO TUNC)**

It appearing from the records and files herein that the Court inadvertently failed to sign and file a certificate of finality under and pursuant to Rule 54(b), and it having been the intention of the Court so to do in order to permit an immediate appeal to, and determination by, the United States Court of Appeals for the Ninth Circuit, and such intention having been evidenced by the designation of the judgment herein as a "Judgment of Dismissal on Merits"; now, therefore, [2]

It Is Expressly Ordered and Determined that there is no just reason for delay, and the Clerk of the above entitled Court is Expressly Ordered and Directed to enter said "judgment on the merits" as a final judgment against the plaintiff, Leo Mantin, and in favor of each of the defendants named and designated in said judgment nunc pro tunc as of May 14, 1956, the date of entry of said "Judgment of Dismissal on Merits".

Dated August 2, 1956.

/s/ PEIRSON M. HALL,
Judge of U. S. District Court

It is hereby stipulated that the foregoing Order

may be signed and filed herein and the same is hereby approved as to form.

FENDLER & LERNER,
HAROLD A. FENDLER and
ROBERT W. LERNER,

/s/ By HAROLD A. FENDLER,
Attorneys for Plaintiff-Appellant

LOYD WRIGHT,
CHARLES A. LORING,
WRIGHT, WRIGHT, GREEN &
WRIGHT,

/s/ By DUDLEY K. WRIGHT,
Attorneys for Defendants-Appellees

[Endorsed]: Filed August 2, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Leo Mantin, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the "Judgment of Dismissal on Merits", etc., entered in this action as a final judgment against the plaintiff nunc pro tunc as of May 14, 1956 pursuant to a Certificate of Finality under Rule 54(b) filed August 2, 1956.

Dated this 2nd day of August, 1956.

FENDLER & LERNER,
HAROLD A. FENDLER and
ROBERT W. LERNER,
/s/ By HAROLD A. FENDLER,
Attorneys for Plaintiff,
Leo Mantin [4]

Affidavit of Service by Mail attached. [5]

[Endorsed]: Filed August 3, 1956.

[Title of District Court and Cause.]

STIPULATION RE NOTICE OF APPEAL
AND INCLUSION OF CERTIFICATE OF
FINALITY UNDER RULE 54(b) IN REC-
ORD ON APPEAL

It Is Hereby Stipulated by and between counsel for the above named plaintiff-appellant and the above named defendants-appellees that the notice of appeal heretofore filed on June 6, 1956, in the above entitled action shall for all purposes be deemed to be a notice of appeal from the final judgment entered nunc pro tunc as of May 14, 1956, pursuant to the Certificate of Finality under Rule 54(b); and

It Is Furthermore Stipulated that the record on appeal shall include said "Certificate of Finality Under Rule 54(b)", and this stipulation and notice of appeal dated August 2, 1956.

Dated August 2, 1956.

FENDLER & LERNER,
HAROLD A. FENDLER and
ROBERT W. LERNER,

/s/ By HAROLD A. FENDLER,
Attorneys for Plaintiff-Appellant

LOYD WRIGHT,
CHARLES A. LORING,
WRIGHT, WRIGHT, GREEN &
WRIGHT,

/s/ By DUDLEY K. WRIGHT,
Attorneys for Defendants-Appellees

[Endorsed]: Filed August 3, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 6, inclusive, contain the original Certificate of Finality; Notice of Appeal; Stipulation re Notice of Appeal and Inclusion of Certificate of Finality; all in the above-entitled case, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above case.

I further certify that my fees for preparing the

foregoing Supplemental Record amount to \$2.00 which sum has been paid by appellant.

Witness my hand and seal of the said District Court this 12th day of September, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk

/s/ By CHARLES E. JONES,
Deputy

[Endorsed]: No. 15188. United States Court of Appeals for the Ninth Circuit. Leo Mantin, Appellant, vs. Broadcast Music, Inc., a corporation et al., Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: July 12, 1956.

Supplemental Filed: Sept. 14, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

District Court for the Southern District of California, Central Division.

The foregoing shall be deemed to be compliance with Rule 17, subdivision (6) of the Rules of the United States Court of Appeals for the Ninth Circuit.

Dated: July 20, 1956.

FENDLER & LERNER,
HAROLD A. FENDLER,
ROBERT W. LERNER and
ROBERT HAVES,

/s/ By HAROLD A. FENDLER,
Attorneys for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 2, 1956. Paul P. O'Brien,
Clerk.

No. 15188.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEO MANTIN,

Appellant,

vs.

BROADCAST MUSIC, INC., a corporation, *et al.*,

Appellees.

APPELLANT'S OPENING BRIEF.

FENDER & LERNER,
HAROLD A. FENDLER,
ROBERT W. LERNER,
ROBERT HAVES,

333 South Beverly Drive,
Beverly Hills, California,

Attorneys for Appellant.

FILED

JAN 11 1957

PAUL P. O'BRIEN, CLERK



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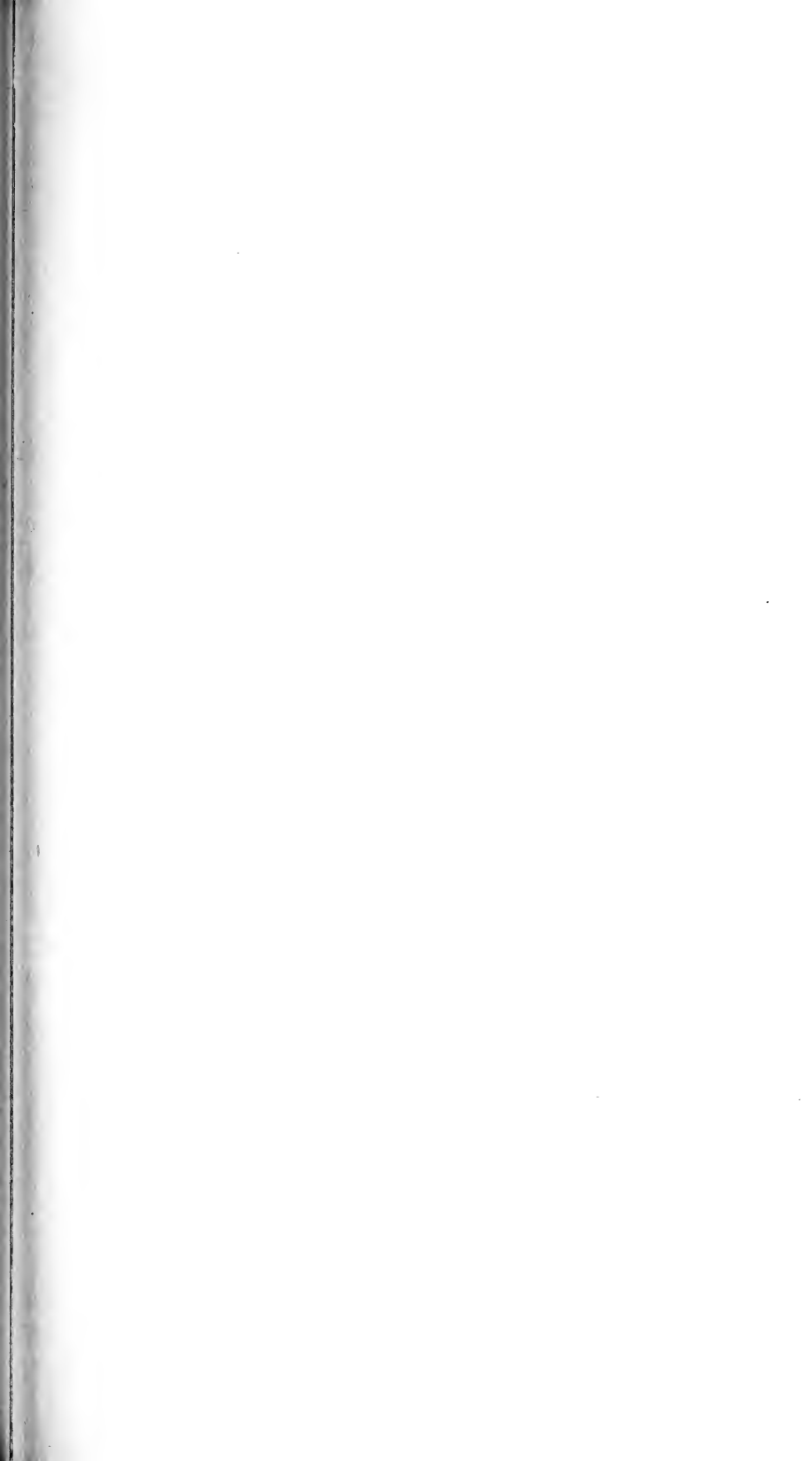
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No. 15188.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEO MANTIN,

Appellant,

vs.

BROADCAST MUSIC, INC., a corporation, *et al.*,

Appellees.

APPELLANT'S OPENING BRIEF.

Proceedings Below.

The fundamental issue on this appeal is the interpretation of the California two-year statute of limitation (Cal. Code Civ. Proc., Sec. 339, subd. 1) and its application to plaintiff's complaint which charges the defendants with plagiarism and unfair competition.

In pertinent part, the statute reads as follows:

"§339. [Within two years.] Within two years:

1. An action upon a contract, obligation or liability not founded upon an instrument in writing.

. . ."

Plaintiff filed his complaint, containing three counts, in the District Court of the United States for the Southern District of California, Central Division, on January 19, 1955 [R. 14]. Shortly thereafter, the complaint was

amended, pursuant to stipulation, by substituting a new paragraph in the first count [R. 17-19]. Prior to any other proceedings, the appearing defendants moved to dismiss the action on the ground that the complaint failed to state a claim upon which relief could be granted. F. R. C. P. 12(b)(6). [R. 14-16.]

The defendants based their motion on several different grounds [R. 14-16.] The Court below denied the motion on all grounds, save one. On the basis of the California *two*-year statute of limitations (Code Civ. Proc., Sec. 339, subd. 1)* *alone*, the District Court granted the motion [R. 48-51]. Judgment of dismissal as to *all* counts followed [R. 50]. The judgment expressly holds unmeritorious all other grounds of dismissal urged by the appearing defendants [R. 49-50]. Plaintiff has appealed [R. 51, 57-58].

Jurisdictional Statement.

The jurisdiction of the District Court is based upon diversity of citizenship. (28 U. S. C., Sec. 1332(a)(1).) Paragraph I of the first count of the complaint discloses that plaintiff is a citizen of California [R. 3]. Paragraphs

*The judgment, at one point, inadvertently recites that plaintiff's causes of action are barred "by the provisions of California Code of Civil Procedure, Section 399 (*sic*) Subdivision 1" [R. 50, Part 3, first paragraph]. This was, undoubtedly, a typographical error. The second paragraph of Part 3 of the judgment correctly states the applicable section as "339 Subdivision 1" [R. 50]. Defendants motion to dismiss was based on section 339, subdivision 1 [R. 15]. Moreover, section 399 has no subdivisions and it is not a limitation statute.

Therefore, while we wish to direct the Court's attention to the error appearing in the judgment, we think that it is merely typographical. The intent of the Court below was clear: To hold unmeritorious all grounds urged for dismissal, except the ground based on California Code of Civil Procedure, Section 339, subdivision 1.

II and III of the first count of the complaint disclose that each defendant is a citizen of a State of the United States other than California or of a foreign country [R. 3-5]. The amount in controversy is alleged to be in excess of \$3,000, exclusive of interest and costs [Complaint, par. V, R. 5]. All of the above allegations are incorporated by reference in the second and third counts [R. 9-10, 11-12]. The appearing defendants did not contest the jurisdiction of District Court. Documents filed by them affirmatively show that each is a corporation, incorporated under the laws of a State other than California [R. 14-15].

This court has appellate jurisdiction, under 28 U. S. C. Sec. 1291, 28 U. S. C. Sec. 1294, to review the final judgment entered against plaintiff herein [R. 49-51]. The District Court Judge has, pursuant to stipulation, signed an appropriate certificate of finality under Federal Rule 54(b), determining that there is no just reason for delay and ordering the Clerk to enter the judgment against plaintiff as a final judgment [R. 56-57]. Rule 54(b) has recently been held valid by the Supreme Court, *Sears Roebuck & Co. v. Mackey*, 351 U. S. 427, 76 S. Ct. 895, 100 L. Ed. 1297 (1956) and *Cold Metal Process Co. v. United Eng. & Fdry. Co.*, 351 U. S. 445, 76 S. Ct. 904, 100 L. Ed. 1311 (1956).

The action, as will appear, is one involving multiple claims. The complaint contains three counts. The claims are based upon infringement of common law rights in literary property and upon unfair competition, involving *inter alia*, appropriation of the name of a musical property [R. 11]. Such an action is a "multiple" claim action consisting of separate, not joint, claims. *Collins v. Metro-Goldwyn-Mayer*, 106 Fed. 83 (2nd Cir., 1939), ap-

proved in *Reeves v. Beardall*, 316 U. S. 283, 284, 62 S. Ct. 1085, 1087, 86 L. Ed. 1478, 1479 (1942), and cited with approval in *Sears Roebuck & Co. v. Mackey*, 351 U. S. 427, 438, 76 S. Ct. 895, 901, 100 L. Ed. 1297, 1307 (1956); *Leo Fiest, Inc. v. Song Parodies*, 146 F. 2d 400 (2nd Cir., 1944); *American Broadcasting Co. v. Wahl Co.*, 121 F. 2d 412 (2nd Cir., 1941).

See, also the recent decision in *Cold Metal Process Co. v. United Eng. Fdry. Co.*, 351 U. S. 445, 452, 76 S. Ct. 904, 909, 100 L. Ed. 1311, 1318 (1956) affirming the right of the District Court Judge to determine the separability of the claims and to effectuate that determination by executing a certificate of finality. The judgment is, therefore, appealable and this court has appellate jurisdiction. (*Prickett v. Consolidated Liquidating Corp.*, 180 F. 2d 8 (9th Cir., 1950), as explained in *Steiner v. Twentieth Century Fox Film Corp.*, 220 F. 2d 105, 107 (9th Cir., 1955). See also: *United Artists Corp. v. Masterpiece Productions*, 221 F. 2d 213 (2nd Cir., 1955); *Colonial Airlines v. Janas*, 202 F. 2d 914 (2nd Cir., 1953); *Bendix Aviation Corp. v. Glass*, 195 F. 2d 267 (3rd Cir., 1952).

Statement of Facts.

The judgment from which this appeal is taken was entered after the granting of defendant's motion to dismiss. On such an appeal the appellate court must accept as true all the well-pleaded allegations of the complaint.

See:

Guessefeldt v. McGrath, 342 U. S. 308, 310, 72 S. Ct. 338, 340, 96 L. Ed. 342, 346 (1952);

United States v. New Wrinkle, 342 U. S. 371, 376, 72 S. Ct. 350, 353, 96 L. Ed. 417 (1952);

Yuba Consolidated Gold Fields v. Kilkeary, 206 F. 2d 884, 889 (9th Cir., 1953);

Tipton v. Bearl Spratt Co., 175 F. 2d 432, 435 (9th Cir., 1949), and cases there cited;

Technical Tape Corp. v. Minnesota Mining & Mfg. Co., 200 F. 2d 876, 878 (2nd Cir., 1952);

Union Planters Nat. Bank v. Henslee, 166 F. 2d 993, 994 (6th Cir., 1948).

Moreover, plaintiff is entitled to "the most favorable inferences" which can be drawn from the pleadings. (*Sidebotham v. Robison*, 216 F. 2d 816, 831 (9th Cir., 1955).) The case must be viewed "in the aspect most favorable to the plaintiff and most unfavorable to the defendant" (emphasis supplied).

Woods v. Hillcrest Terrace Corporation, 170 F. 2d 980, 984 (8th Cir., 1948);

Continental Distilling Corporation v. Humphrey, 220 F. 2d 367, 371 (D. C. Cir., 1954);

Chicago & Northwestern Ry. v. First Nat. Bank, 200 F. 2d 383, 384 (7th Cir., 1952);

Federal Telephone & R. Corp. v. Associated Tel. & T. Co., 169 F. 2d 1012 (3rd Cir., 1948) (cert. den. 335 U. S. 859, 69 S. Ct. 133, 93 L. Ed. 406 (1948).)

On the basis of the pleadings, the facts before the Court are these:

In 1922, plaintiff, an internationally known producer of musical acts, sketches and revues, "originated, created and composed an unique, novel and original song and musical composition, with words and music, entitled WHERE IS YOUR HEART" [Complaint, pars. I, VI, R. 3-5-6]. Furthermore, plaintiff has, for many years, and in many

countries, sung his composition in nightclubs, music halls, theatres and hotels, as well as "other places of amusement and entertainment" [Complaint, par. VII, R. 6]. *Plaintiff has never in any form published the composition, and plaintiff has never, in any way, consented to, or authorized, the publication of his composition* [Complaint, par. VI, R. 6].

Plaintiff, at all times has owned and retained all common law rights in the composition [Complaint, par. VI, R. 6]. Plaintiff's composition was filed with the District Court as Exhibit A to the complaint [R. 6].

At all relevant times, each and every defendant "had full knowledge and notice of plaintiff's rights of ownership, and [his] exclusive rights of performance, use and exploitation" throughout the world [Complaint, par. VII, R. 6].

While using the same infringing song, the different defendants have invaded plaintiff's common law rights at different times and through several different media, such as motion pictures, radio, television, phonograph records, publication of sheet music, etc. The methods used to infringe, the manner of infringement, and the dates on which each of the infringements commenced are completely severable and vary with each different type and media of infringement. The respective differences in type of infringement and the approximate dates of commencement by each of the various defendants are alleged as follows:

1. *Infringement by Motion Picture Photoplay.*

Defendant Romulus Film Ltd. (hereinafter called "Romulus") produced and, in conjunction with defendant United Artists Corporation (hereinafter called "United

Artists”), released a motion picture photoplay entitled *Moulin Rouge*. In this film the infringing song, “WHERE IS YOUR HEART”, also known as the “SONG FROM MOULIN ROUGE” was recorded and sung [Complaint, par. VIII, R. 6-7]. A copy of the sheet music of the infringing composition was filed in the District Court as plaintiff’s Exhibit B [Complaint, par. XII, R. 9]. *This song “substantially copies and appropriates the words and music of plaintiff’s original song and composition entitled ‘WHERE IS YOUR HEART?’ ”* [Stipulation *re* amendment of Complaint, p. 2, lines 14-16, R. 17-18]. These defendants acted with full knowledge of plaintiff’s exclusive rights in the composition [*id.* R. 17-18].

In Los Angeles County only, the film containing the infringing composition, was released on December 23, 1952 and its exhibition within Los Angeles County was continuous from that date until April 12, 1955, when the amendment to the complaint was filed [Stipulation *re* Amendment of Complaint, R. 18]. At a later date the film was released and exhibited in all other states of the United States and in all other parts of the world. This release commenced on February 1, 1953, *less than two years prior to the commencement of the action*, and has also been continuous [Stipulation *re* Amendment of Complaint, R. 18].

Defendants Romulus and United Artists caused the infringing song to be sung and performed as part of the exhibition of the motion picture at each public showing of the film during its continuous and world-wide exhibition [Stipulation *re* Amendment of Complaint, R. 18].

2. *Infringement by Publication of Sheet Music.*

“During the year 1953” [Complaint, par. IX, R. 7] and continuously thereafter, in Los Angeles County, and in other parts of the United States and the rest of the world, defendant Broadcast Music, Inc. (hereinafter called “BMI”) published or caused the publication of the infringing work in sheet music form [*id.*, R. 7]. Furthermore, BMI caused the sheet music to be used by professional entertainers and caused it to be “sold and distributed to the general public” [*id.*, R. 7].

Defendant BMI’s purported Certificate of Registration of Copyright, E Pub. 69688, on *The Song From Moulin Rouge* (WHERE IS YOUR HEART?) recites its first “publication” as occurring on *February 6, 1953, less than two years before the date of filing herein*. This certificate is, by stipulation, part of the record on appeal [R. 42-43], and is *prima facie* proof of the facts stated therein (17 U. S. C. 209, 61 Stat. 652).

3. *Infringement by Phonograph Records.*

Defendants London Record Sales, Inc., Brunswick Record Corporation, Capitol Records Distributing Co., Inc. of California, Capitol Records Distributing Co., Inc. of Georgia, Columbia Recording Corporation (a Delaware corporation), Columbia Recording Corporation (a New York corporation), Mercury Record Corporation, Mercury Record Distributors, Inc., RCA Victor Company, Inc., Radio Corporation of America, RCA Manufacturing Co., Inc. (This group of defendants is sometimes referred to as “the defendant record companies”), recorded the infringing song on phonograph records and caused the records to be “sold and distributed to the general public” in Los Angeles County and in each of the other United

States and elsewhere throughout the world. *This infringement began on February 1, 1953, less than two years before the complaint was filed, and has been continuous since said date* [Complaint, par. X, R. 7-8].

4. *Infringement by Radio Broadcast.*

Defendants Columbia Broadcasting System, Inc., National Broadcasting Company, Inc., and American Broadcasting Company, Inc. (sometimes hereinafter referred to as "the defendant broadcasting companies"), have caused the infringing work to be performed and broadcast over their broadcasting systems and over "hundreds of radio stations throughout the United States" and in Los Angeles County, California. *This infringement commenced on February 1, 1953, less than two years before the complaint was filed, and has been continuous thereafter* [Complaint, par. XI, R. 8-9].

Each infringement by each defendant in each media was committed with full notice and knowledge of plaintiff's rights [Complaint, par. XIII, R. 9]. Each of these infringements was committed without plaintiff's consent or authority [*id.*, R. 9]. The infringements are alleged to have damaged plaintiff in the sum of \$500,000.00, no part of which has been paid [*id.*, R. 9].

SECOND COUNT.

The second count is based on unfair competition. It incorporates by reference all of the facts set forth above, except the allegations of damage [Complaint, Second Cause of Action, par. I, R. 9-10], and adds the following:

Plaintiff's widespread performance and singing of his composition, throughout the world, for more than thirty years, has caused "thousands of persons in the entertain-

ment industry and hundreds of thousands of persons constituting the general public” to identify plaintiff’s song and its title with plaintiff [*id.*, par. II, R. 10]. By reason thereof, a secondary meaning has attached to the song and to the title “WHERE IS YOUR HEART?” The entertainment industry and the general public have identified the same solely with the plaintiff [*id.*, R. 10].

Because of the acts of defendants, the entertainment industry and the general public have been confused and misled into believing that plaintiff did not originate and create the song “WHERE IS YOUR HEART?” By reason of this deception and confusion, caused by the defendants, plaintiff has been deprived of all recognition and credit as the composer, originator and creator of “WHERE IS YOUR HEART?” [*id.*, par. III, R. 10-11].

Plaintiff has been precluded from claiming ownership or title to the composition and has been unable to perform his composition for profit [*id.*, par. III, R. 11].

This deception and confusion of the general public and entertainment industry began during the year 1953 and has been continuous since that time [*id.*, par. III, R. 10].

In addition, defendants have unfairly competed with the plaintiff by their “use, advertising and exploitation of the *title* of plaintiff’s original song and musical composition entitled “WHERE IS YOUR HEART?,” after the secondary meaning had attached thereto and the title had become identified with plaintiff [*id.*, par. IV, R. 11].

By reason of defendants' unfair competition, plaintiff has been damaged in the sum of \$250,000, in addition to the damages incurred by reason of the facts alleged in the first count [*id.*, par. V, R. 11].

THIRD COUNT.

The third count seeks the equitable relief of injunction and accounting. The operative facts are primarily those which are alleged in the first and second counts. All of the allegations of those counts are incorporated by reference in the third count, except the allegations of damage [Complaint, Third Cause of Action, par. I, R. 11-12]. In addition, plaintiff alleges that defendants Romulus and United Artists have threatened to, and intend to, continue the release, distribution and exhibition of the film containing the infringing song. The other defendants have also threatened to, and intend to, continue their acts of infringement [*id.*, par. II, R. 12]. Unless the defendants are enjoined, plaintiff will suffer irreparable injury for which the remedy at law is inadequate [*id.*, par. III, R. 12].

Plaintiff also asks for the equitable remedy of an accounting of profits from each defendant, on the ground that they have secured, by means of their acts of infringement, "profits and privileges to which plaintiff is solely and exclusively entitled by reason of his ownership of" the musical composition "WHERE IS YOUR HEART?" [*id.*, par. IV, R. 12-13].

Specification of Errors.

Appellant specifies as error the following:

1. The granting by the District Court of defendants' motion to dismiss upon the ground that plaintiff's complaint, and each claim contained therein, and the entirety of each claim, was barred by the California two-year statute of limitation, Code of Civil Procedure, Section 339.1.

2. The judgment of dismissal entered against appellant and in favor of appellees based upon the District Court's conclusion that plaintiff's complaint and each count contained therein, and the entirety of each count, was barred by the California two year statute of limitations, Code of Civil Procedure, Section 339.1.

Questions Presented.

The questions presented by this case arise by reason of defendant's motion to dismiss [R. 14-16] and from the lower court's determination that all of plaintiff's remedies as to all defendants were barred by the statute of limitations [R. 49]. The lower court expressly ruled that all of the other grounds of defendants' motion were *not* meritorious [R. 49-50].

The sole issues on this appeal involve the applicability of the California statutes of limitations to the infringements committed by the various defendants.

The specific questions involved in this appeal are these:

1. Are plaintiff's "common law copyright" claims against defendants Romulus and United Artists wholly barred by the California two-year statute of limitations (Code Civ. Proc., Sec. 339.1) although such claims are based on a series of separate torts, which are alleged to have been continuing and repeated until the date the complaint was filed?

2. Are plaintiff's "common law copyright" claims against each of the other defendants barred by the California two-year statute of limitations (Code Civ. Proc., Sec. 339.1) although *none* of these defendants are alleged to have committed a single infringing act prior to two years before the commencement of this action and *no* cause of action accrued to plaintiff except within the limitations period?

Are these claims barred although the separate torts of these defendants were continuing and repeated until the amendment to the complaint was filed?

3. Are plaintiff's claims of unfair competition barred although nothing in the record shows that a single tort of unfair competition was committed except within the limitations period?

Are these severable claims barred although each series of torts was continuing and repeated by each different defendant until the date the action was commenced?

4. Are plaintiff's claims for equitable relief barred although his legal remedies are not?

a. Are plaintiff's claims for injunctive relief against future torts barred by any statute of limitation? If any statute of limitation is applicable, are plaintiff's claims subject to the two-year statute of limitations or subject only to the four-year statute which applies to actions "*for relief* not hereinabove provided for." (Emphasis added; Cal. Code Civ. Proc., Sec. 343.)

b. Are plaintiff's claims for an accounting of profits barred by any statute of limitation of a period less than four years?

ARGUMENT.

Introduction and Summary.

The record in this case is crystal clear. The complaint was filed on January 19, 1955. The sole statute invoked by the defendants was California Code of Civil Procedure, Section 339.1 [R. 15]—a two year statute. Only one act participated in by but two defendants was commenced prior to January 20, 1953, the beginning of the two year period. That one act was the release and exhibition of the film, *only in Los Angeles County*, in December of 1952. It is specifically alleged that the film was first exhibited outside of Los Angeles in February, 1953 and was continued in release by defendants Romulus and United Artists from then to the date the amendment to the complaint was filed [April 12, 1955, R. 18]. The infringement of plaintiff's rights by these two defendants was in the nature of a series of continued and repeated torts. Under such circumstances, the sole effect of a statute of limitations would be to make unrecoverable those damages suffered by plaintiff prior to January 20, 1953.

But, of much greater significance in this case are the plain facts that *no cause of action or claim arose or could have arisen against any other defendant until after January 20, 1953*. No claim could have been prosecuted by plaintiff against the other defendants prior to that date and no statute of limitations can, therefore, bar plaintiff's remedies.

No cause of action against BMI could arise before it commenced publication of the sheet music. By its own admission, that date was February 6, 1953 [R. 43], *within any two year limitations period*.

No cause of action could arise against any of the defendants record companies until it manufactured or sold phonograph records reproducing the infringing composition. This first commenced on or about February 1, 1953 [R. 7-8], *within any two year limitation period.*

No cause of action against the defendant broadcasting companies could arise before they first broadcast the infringing composition. The first such date alleged in the complaint is February 1, 1953 [R. 8-9] *within any two year limitation period.*

The simple truth is that plaintiff had no cause of action for infringement of his common law rights against defendant BMI (the distributor of the sheet music), or against the defendant record companies, or against the defendant broadcasting companies *until after February 1, 1953.* These defendants had done nothing to infringe plaintiff's rights prior to that date and no cause of action had accrued. Plaintiff filed his action on January 19, 1955, *within* the limitations period for an action for damages for infringement of common law musical property rights.

Moreover, these torts were continuing and repeated in nature, lasting until the complaint was filed. On any analysis, plaintiff's claims against these defendants are not barred.

A cause of action or claim for unfair competition is different from a claim for infringement of common law copyright. It may, as is alleged in this case [R. 10-11], contain the element of confusion of the public. Plaintiff, in his second count, pleads that this cause of action came into existence "during the year 1953" [Complaint, Second Cause of Action, par. III, R. 10], when the public and

the entertainment industry were first confused and misled by defendant's acts. There is no date in the record of this case to establish that public and industry confusion came into being before January 20, 1953, the date of the commencement of the limitations period. Defendants have not, by affidavit, or otherwise, supplied such a date. The sole date put into the record by any defendant is the date of first publication of the infringing sheet music. *That date is February 6, 1953*, within the two year period [R. 42]. As to appropriation of plaintiff's title and the unfair competition resulting therefrom, the Complaint discloses February 1, 1953 as the date appropriation began [R. 11].

There is not one date, or one fact, in the record of this case which could bar plaintiff's second count.

The third count seeks the equitable relief of injunction and accounting based primarily on the facts alleged in the first two counts. Since the legal rights which may be subject to a two years statute, are not barred, the equitable rights may, in any event, be enforced. Moreover, even if the legal rights are wholly or partially barred, the equitable rights under California law are amenable only to the four year statute of limitations (Cal. Code Civ. Proc., Sec. 343). Furthermore, by an unbroken line of decisions, plaintiff's right to an accounting is subject only to the four year statute.

If any of these arguments are well-taken—and we submit that they all are meritorious—plaintiff is entitled to a reversal and to a trial on the merits.

I.

Plaintiff Has Full Rights and Remedies to Redress Those Infringements of His Common Law Rights Which Occurred Within Two Years Next Preceding the Commencement of the Action, Against the Defendants Who Produced, Released and Exhibited the Motion Picture.

This section of the brief deals solely with the liability of defendants Romulus and United Artists. Romulus produced the motion picture "MOULIN ROUGE." On or about the 23rd day of December, 1952 Romulus and United Artists first released the film. Continuously since that date these two defendants "distributed and caused to be exhibited in the County of Los Angeles, State of California" the motion picture MOULIN ROUGE [R. 18]. Release, distribution and exhibition outside of California commenced February 1, 1953 and has been continuous since that date [R. 18].

The defendants have argued that the initial exhibition sets the date on which *all* liability was incurred as to *every* defendant. They have argued that the statute of limitations as to *all* liability commenced to run on that date. They have argued that all of plaintiff's remedies against all of them were barred two years from the date of the first showing of the motion picture. They have argued it is immaterial that exhibition was continuous from that date until the amendment to the complaint was filed [April 18, 1955, R. 19] or that other infringing acts occurred within the two-year limitations period.

The defendants have contended that the California decision of *Italiani v. Metro-Goldwyn-Mayer Corp.*, 45 Cal. App. 2d 464, 114 P. 2d 370 (1941), conclusively establishes their contentions.

A. The *Italiani* Case Expresses No Opinion on the Issue of Continued and Repeated Infringement Presented by the Instant Case and Does Not Control the Decision Here.

The *Italiani* case should be carefully analyzed in its relationship to the appeal now before this Court. At the outset it should be noted that the opinion in the *Italiani* case strongly resembles a decision under certified question procedure. The sole issue presented to the Court by the briefs was: Which section of the California Code of Civil Procedure applied to actions for plagiarism? As stated by respondents:

“ . . . appellant’s brief correctly sets forth that the *sole* question to be determined is whether section 338(3) or 339(1) of Code of Civil Procedure is the applicable statute of limitations in the case at bar.” Respondents Reply [*sic*] Brief (p. 1), (emphasis supplied).

Plaintiff-appellant contended the three-year statute, Code of Civil Procedure, Section 338, subdivision 3 applied (see App. Op. Br.). Defendants-respondents argued that the two year statute, Code of Civil Procedure, Section 339, subdivision 1, was the pertinent legislation. The District Court of Appeal itself described the controversy in this manner (45 Cal. App. 2d 464, 465, 114 P. 2d 370, 371 (1941)), and held for the respondents.

As the question came before the District Court of Appeal, that Court decided the only issue presented to it: which code section was applicable? Appellant’s attorney, in his brief in the *Italiani* case did not mention the fact that the amended complaint alleged that exhibition had been continuous within the past three years. Respondents (with good reason) also failed to mention this allegation. The Court quotes substantially all of the paragraph of

the amended complaint which deals with time (45 Cal. App. 2d 464, 465, 114 P. 2d 370, 371-372 (1941)), and then resumes its discussion as to which code provision should be applied to plagiarism actions. No one—parties or judges—discussed the problems arising from the allegation of continuous exhibition.

Plaintiff-appellant did not petition for a rehearing. He did not petition for a hearing by the California Supreme Court. The limitations question of the *Italiani* case has never been presented to the California Supreme Court and has never been reaffirmed in the State's intermediate appellate courts. The limitations questions raised by the instant case and discussed in this brief have not been considered in any California decision of which we are aware.

The limitations question of the *Italiani* case in its relationship to continued exhibition has been discussed in but one reported decision. In that case a distinguished and extremely able judge of the Federal District Court held in accordance with the contentions advanced in this brief. District Judge Yankwich held, in *Cain v. Universal Pictures Co.*, 47 Fed. Supp. 1013 (D. C. Cal., 1942), that where exhibition of an infringing film was continuous, *the plaintiff's claim was NOT barred by the statute two years after first release of the film.* The statutory period was extended by the continued invasion of plaintiff's rights. The *Cain* case is more fully discussed below.

The defendants here have also urged, in effect, that because this is a diversity case, *Italiani* produces a complete paralysis of the Federal Judiciary and requires (on the basis of a point not even discussed in the decision) a judgment in their favor.

We do not agree. We submit that both reason and unimpeachable authority require reversal.

That state statutes of limitation apply in diversity cases has been long established under the Rules of Decision Act, Section 34 of the Judiciary Act of 1789. 1 Stat. 92; 28 U. S. C. 1652. But in the matter of interpretation of those statutes, the United States Supreme Court has stated that federal courts would be governed by state statutes of limitation "as construed by its [the state's] *highest court*." (Emphasis supplied.) See *e.g. Bauserman v. Blunt*, 147 U. S. 647, 652-653; 13 S. Ct. 466, 469, 37 L. Ed. 318 (1893) and cases there cited; *Metcalf v. City of Watertown*, 153 U. S. 671, 673, 14 S. Ct. 947, 948, 38 L. Ed. 861, 863 (1894); *Van Dyke v. Parker*, 183 Fed. 35, 37 (9th Cir., 1936). The *Italiani* case was decided by an intermediate state court.

Moreover, the Supreme Court of the United States has not been reluctant to distinguish state Supreme Court decisions. It has not been reluctant to ignore state Supreme Court *dicta* which, if applied, would be dispositive of the issue before the Court. See *e.g. Michigan Insurance Bank v. Eldred*, 130 U. S. 693, 9 S. Ct. 690, 692, 32 L. Ed. 1080, 1082 (1889). And federal courts have thoroughly examined the meaning and intent of state court decisions before applying them in statute of limitations cases. See *e.g. Metcalf v. City of Watertown*, 153 U. S. 671, 14 S. Ct. 947, 38 L. Ed. 361 (1894).

In a federal district court decision, which has been cited with approval by this Court, the notion that federal courts

are completely controlled by the limitations decisions of intermediate state appellate courts was firmly rejected. Moreover, it was held that Federal Courts are *not* bound by the decisions of intermediate State Courts which are not definitive on the precise issue before the federal court. Nor are federal courts bound by state court *dicta*, or by implications from decisions.

“Nor are the federal courts controlled by mere dicta of a state court. *Carroll v. Carroll*, 16 How. 275, 14 L. Ed. 936; *Matz v. Chicago R. R.* (C. C.) 85 Fed. 180; *In re Sullivan*, 148 Fed. 815, 78 C. C. A. 505; *Southern R. R. v. Simpson*, 131 Fed. 705, 65 C. C. A. 563. *Nor does a construction of statute, based merely upon implications from the language of a judicial opinion, control the federal court.* *Caesar v. Capell* (C. C.) 83 Fed. 403; *Adelbert College v. Wabash R. R.*, 171 Fed. 810, 96 C. C. A. 465, 17 Ann. Cas. 1204.” (Emphasis supplied.)

Graham v. Englemann, 263 Fed. 166, 168 (D. C. Tex., 1920), cited and relied upon by this Court in *Van Dyke v. Parker*, 83 Fed. 35, 37 (9th Cir., 1936).

Under these precedents, the federal courts are not paralyzed by a state court decision, which does not even purport to rule on a principal contention made here by plaintiff. When a question has not been expressly ruled upon, the federal courts, sitting as “another court of the State” (see *Holmberg v. Armbrecht*, 327 U. S. 392, 394, 66 S. Ct. 582, 583, L. Ed. 743, 746 (1946)) are as free as state courts to examine precedents and weigh reasons in reaching a decision.

B. These Defendants Have Committed Continued and Repeated Infringements Upon Plaintiff's Common Law Rights. Plaintiff May Recover for Such of These Torts as Occurred Within the Limitation Period.

The record in this case is clear. Defendants Romulus and United Artists, *continually* distributed and exhibited the film, *Moulin Rouge*, for the two year period next preceding the filing of the complaint [R. 17-18]. That initial release of the film took place more than two years before filing, is a fact which may bar the recovery of damages incurred in the short period previous to the commencement of the two-year period. But it is no ground for barring the action.

The damaging act of public exhibition or distribution has always been the essential element of a cause of action for invasion of common law rights in literary, artistic or musical property. Infringement of common law rights in literary or musical property (or, as it is sometimes called, "common law copyright") is a tort. *Weitzenkorn v. Lesser*, 40 Cal. 2d 778, 784, 256 P. 2d 947, 953 (1953) and the defendants participating therein are tort feorsors. *Barsha v. Metro-Goldwyn-Mayer*, 32 Cal. App. 2d 556, 559, 90 P. 2d 371, 373 (1939). Moreover, an action to recover damages for infringement of common law copyright has always been considered an action for consequential damage and, therefore, in the nomenclature of the old forms of action, "an action on the case". *Donaldson v. Beckett*, 4 Burr. 2408, 98 E. R. 257 (1774); 13 *Corpus Juris*, 1190 and cases there cited; *Atwill v. Ferrett*, 2 Fed. Cas. 195 (Case No. 640, 2 Blatch 39 (C. C. S. D. N. Y., 1846)); Drone, *Copyrights*, 495.

On fundamental principles, therefore, *damage* has always been an integral element of the cause of action.

Golding v. R.K.O. Pictures, 35 Cal. 2d 690, 696, 221 P. 2d 95, 97 (1950):

“The rights asserted in this case are not based upon statutory copyright but stem from the so-called common-law copyright. (Civ. Code §980.) Upon such a cause of action, to recover for infringement, or piracy, of literary property, three elements must be established: (1) ownership by the plaintiff of a protectible property interest; (2) unauthorized copying of the material by the defendant; and (3) damage resulting from the copying. (See *Caruthers v. R.K.O. Radio Pictures, Inc.*, 20 F. Supp. 906, 907.)”

See also, 34 *Am. Jur.* 416-417.

In *Cain v. Universal Pictures Co.*, 47 F. Supp. 1013, 1017-1018 (D. C. Cal., 1942) it was held that:

“*So the wrong done to the plaintiff in a case of this character does not lie in the mere copying of his material, which, without publication or incorporation into a motion picture, would result in no injury to him. It consists of (1) the deliberate appropriation of a portion of his work and its delivery to others for (2) inclusion in the finished picture and (3) exhibition to the public.*” (Emphasis supplied.)

This language has been quoted and approved by this Court. (*Universal Pictures Co. v. Harold Lloyd Corporation*, 162 F. 2d 354, 365 (9th Cir., 1947).)

The exhibition of the film is the essential damaging act. *In the instant case the damage by exhibition arises from the performance of plaintiff's song in the motion picture produced and released by defendants Romulus and United Artists* [R. 17-18].

It is well-established that each invasion of exclusive rights to literary or musical property is a separate damaging act, a separate infringement and a separate tort.

“The number of infringements by public performance of a copyrighted musical or dramatic composition, or of a copyrighted motion-picture photoplay, is equal to the number of unlicensed performances.”

Ball, *Law of Copyright and Literary Property*, 636.

“When the defendants had exercised the license, it was exhausted, and the alleged exhibition [of the motion picture] on an additional day constituted both a breach of the contract and a trespass upon the monopoly conferred upon the plaintiff by the copyright.”

Metro-Goldwyn-Mayer D. Corp. v. Bijou Theatre Co., 3 Fed. Supp. 66, 74 (D. C. Mass., 1933).

In *Jewell-LaSalle Realty Co. v. Buck*, 283 U. S. 202, 204, 205, 51 S. Ct. 407, 408, 75 L. Ed. 978, 980 (1931) the Supreme Court, per Justice Brandeis stated:

“It was settled in *Westerman Co. v. Dispatch Printing Co.*, 249 U. S. 100, 39 S. Ct. 194, 63 L. Ed. 499, which dealt with the infringement by a newspaper of the monopoly of copying, that *for each publication* \$250 is the minimum damages. *An unbroken line of decisions in the lower courts has since held that the rule declared in the Westerman Case is applicable also to infringement of the monopoly of giving public performance.*” (Emphasis supplied.)

The Court held that the rule applied to performance by radio broadcasts and radio loudspeakers.

The holding of the *Jewell-LaSalle* case was applied to infringing performance by means of motion picture ex-

hibition in *Tiffany Productions v. Dewing*, 50 F. 2d 911, 917 (D. C. Md., 1931), cited with approval by this Court in *Universal Picture Co. v. Harold Lloyd Corporation*, 162 F. 2d 354, 359, 367 (9th Cir., 1947). See also *Law v. National Broadcasting Co.*, 51 Fed. Supp. 798 (D. C. N. Y., 1943), holding that a radio network is responsible and liable for *each* broadcast over *each* of its local stations.

It would unnecessarily prolong this brief to multiply authorities on a proposition so well-established.

Each performance damaged plaintiff. Each performance constituted an infringement. The tort of these defendants, in causing continued exhibition of the film [R. 17-18], is one which is repeated and continuing in nature. *On such a record, the authorities are clear that plaintiff is entitled to recover damages for every performance which occurred within the two years next preceding the filing of the complaint.* The law of California is well-settled on this subject:

Trombley v. Kolts, 29 Cal. App. 2d 699, 708, 85 P. 2d 541, 545 (1938):

“Where the tort is continuing, the right of action is also continuing.”

Phillips v. City of Pasadena, 27 Cal. 2d 104, 107-108, 162 P. 2d 625, 626-627 (1945):

“On the other hand, if the nuisance may be discontinued at any time it is considered continuing in character. (*Kafka v. Bozio*, 191 Cal. 746, 751, 218 P. 753, 29 A. L. R. 833; *Strong v. Sullivan*, *supra*.) Every repetition of a continuing nuisance is a separate wrong for which the person injured may bring successive actions for damages until the nuisance is abated, even though an action based on the original

wrong may be barred. (*Kafka v. Bozio*, 191 Cal. 746, 751, 218 P. 753, 29 A. L. R. 833); *Strong v. Sullivan*, 180 Cal. 331, 334, 181 P. 59, 4 A. L. R. 343); 2 Wood on Nuisances (3d ed.), p. 1308; to the same effect are: *Vowinckel v. N. Clark & Sons*, 216 Cal. 156, 164 (13 P. 2d 733); *Collins v. Sargent*, 89 Cal. App. 107, 116 (264 P. 776; *Williams v. Blue Bird Laundry Co.*, 85 Cal. App. 388, 395; 259 P. 484; cf. *Knight v. City of Los Angeles*, 26 Cal. 2d 764, 160 P. 2d 799; *Natural Soda Prod. Co. v. City of Los Angeles*, 23 Cal. 2d 193, 143 P. 2d 12.

"We cannot say, as a matter of law, that the locked gate constituted a permanent nuisance, since it appears from the allegations in the complaint that it could have been removed at any time. If the nuisance was in fact continuing in character, the claim was filed within time." (Emphasis supplied.)

Obviously, in the instant case, there was no "permanency" in the infringements of these defendants. The infringement easily could have been discontinued at any time.

See, also:

Kafka v. Bozio, 191 Cal. 746, 218 Pac. 753 (1923);

Carbine v. Meyer, 126 Cal. App. 2d 386, 390, 272 P. 2d 849, 853 (1954):

"In all cases of doubt respecting the permanency of the injury, the courts are inclined to favor the right to successive actions. (Kafka v. Bozio, supra, p. 752.)"

Cf. *Komoff v. Kingsbury Cotton Oil Co.*, 45 Cal. 2d 265, 268-271, 288 P. 2d 507 (1955).

The rule applicable here is fully and correctly stated in 34 *Am. Jur.* 127:

“In case the wrongful act is continuous or repeated, so that separate and successive actions may be instituted for the damages as they accrue, and as to such actions for subsequently accruing damages, *the statute of limitations does not run from the date when the first wrong was suffered, but only from the successive dates of the accrual of such damages.*” (Emphasis supplied.)

These cases and authorities undoubtedly formed one of the bases of Judge Yankwich's decision in *Cain v. Universal Pictures Co.*, 47 F. Supp. 1013, 1017-1018 (D. C. Cal., 1942), which was quoted and approved by this court in *Universal Pictures Co. v. Harold Lloyd Corporation*, 162 F. 2d 354, 365 (9th Cir., 1947). In the *Cain* case, Judge Yankwich specifically points out that the first release of the film there involved occurred *more than two years before the action was commenced.* (47 F. Supp. 1013, 1017.) He specifically recognizes the *Italiani* case (p. 1017). Then he holds that:

“Therefore, conceding that the actual distribution of the picture, following its original release, was done by others than [the writer], *the action is not barred, as to him, by the expiration of two years from the date of release.* For the continuous exhibition of the picture is one of the aims of the composition of the script by him.” (Emphasis supplied.) (P. 1018.)

So, here, equally, one of the obvious aims of production and release was continuous exhibition.

An almost identical ruling was made by Chief Justice Taney over 100 years ago in *Reed v. Carusi*, 20 Fed. Cas. p. 431, 432 (No. 11,642) (C. C. D. Md., 1845):

“If the jury find against the defendant upon the two preceding instructions, yet he is not liable in this action, unless he was guilty of the infraction of the copyright within two years before this action was brought; but if the plates were engraved more than two years before, *yet every printing for sale caused by the defendant, would be a new infraction of the right; and if such printing was within two years before the suit was brought, the defendant is liable in this action.*” (Emphasis supplied.)

Within the meaning of the precedents, there was, in this case, no permanency in defendants' tort. Exhibition of the film could have been discontinued at any time. The infringing portions of the film could have been deleted at any time. The tortious conduct could have been stopped at any time. But it was not. The tortious conduct continued and the tort was continuous. Plaintiff has specifically so alleged. [R. 17-18.] Moreover the tort by its very nature was repetitious. If there is any doubt on this point, the cases cited above, and the well-established rules which guide this Court in reviewing judgments entered on motions to dismiss (*supra*) require the doubt to be resolved in the favor of plaintiff.

C. Contrary to Defendants' Argument in the Court Below, Defendants' Infringement Could Not and Did Not Constitute an Abandonment and Publication by Plaintiff, Barring Him From Maintaining This Action.

In fairness to the district court judge, we feel that some mention should be made of the argument advanced by defendants in the court below. While the judge wrote no opinion in the case, defendants advanced but one argument that attempted to free them from the operation of the well-established principles relied on by plaintiff. This argument of defendants must have influenced the decision below.

The defendants' argument was this:

"The difficulty with the plaintiff here is that he [plaintiff] confuses a statutory cause of action under Title 17, U. S. C. A. for infringement of statutory copyright with an action under California Law for the taking of plaintiff's common law intellectual property. *It is absolutely true that under federal statutory copyright each new exhibition by defendant constitutes a new infringement and gives rise to a new cause of action and starts the running of the statute of limitations all over again. But this is by virtue of the statute, Title 17, U. S. C. A., Section 101. There is no comparable statute in California.* The action by plaintiff in the case at bar, therefore, is no different than any other action for the taking and use of personal property." (Emphasis partially added.) (Closing Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss, p. 10, line 3, to p. 11, line 10.)

[Of course, the *Italiani* case, *supra*, so heavily relied on by defendants, held exactly the opposite. It specifically

held that the action is quite different from a taking and use of tangible personal property.]

In the lower court, the defendants summarized their position as follows:

“The reason for the distinction (which plaintiff ignores) between violation of federal statutory copyright is that at common law an author had no right in his intellectual creations except the right of first publication, and once the material was published the author’s rights therein were lost unless statutory copyright was obtained . . . Consequently, when *defendants* publish a motion picture allegedly containing plaintiff’s common law intellectual property, and plaintiff’s common law intellectual property is thereby published, or made “public”, plaintiff’s remedy is an action for damages for *conversion* of his property. The statute of limitations therefore commences to run upon the first publication by defendant of plaintiff’s work, and is not extended by subsequent publications, because the cause of action resulting from each subsequent publication exists only by virtue of statutory provisions. (See 17 U. S. C. A. Section 101.)” (*Id.* p. 13, line 12, to p. 14, line 13, emphasis supplied.)

Of course, common law copyright includes a great deal more than merely the right of first publication, see *e.g.* Amdur, *Copyright Law and Practice*, 35-64 (1936); 18 C. J. S. 139-141. It has often been described as being “of a wider and more exclusive nature than rights conferred by statutory copyright”. *Stanley v. Columbia Broadcasting System*, 35 Cal. 2d 653, 661, 221 P. 2d 73, 78 (1950); *Yadkoe v. Fields*, 66 Cal. App. 2d 150, 160, 151 P. 2d 906, 911 (1944); 18 C. J. S. 138, 139. Further-

more, if defendants contention were correct and the action should be brought for "conversion" of his property, the three year statute, California Code of Civil Procedure, Section 338(3) should apply. If that were true, defendants would have absolutely no defense based on the statute of limitations.

But even aside from this, the artfully phrased but erroneous argument of defendants must fail if any of its premises are unsound and, we submit, *each* of defendants' premises are unsound:

FIRST: Defendants say that the right to recover for repeated violations depends solely upon the federal copyright laws and does not exist at common law. They have cited no authority for this proposition and, to our knowledge none exists.

We have discussed at length, *supra*, the California law and the common law dealing with the nature of plaintiff's cause of action and the continuing and repeated torts committed by defendants. There is no reason advanced by defendants for not applying the same rules to the torts of repeated infringements of plaintiff's common law rights in literary or musical property.

SECOND: The next confusion relied on by defendants is the argument that somehow plaintiff's rights could become dedicated by the *unlicensed and unauthorized* infringements which occurred in this case. It is incontestably the law that a performance, *without the consent of the owner of the common law rights*, is not a general publication and *does not result in dedication of those rights*.

Stanley v. Columbia Broadcasting System, 35 Cal. 2d 653, 661, 221 P. 2d 73, 78 (1950):

“The common law prohibits any kind of unauthorized interference with, or use of, an unpublished work on the ground of an exclusive property right, and the common-law right is perpetual, existing until lost or terminated by the *voluntary act* of the owner.” (Emphasis supplied.)

Amdur, *Copyright Law & Practice*, 56 (1936):

“Common law rights are not destroyed by a publication not authorized by the author thereof.”

Nimmer, *Copyright Publications*, 56 Col. L. Rev. 185, 187 (1956);

National Comics Publications v. Fawcett Publications, 191 F. 2d 594 (2nd Cir., 1952) (per L. Hand, Jr.);

United States v. Certain Parcels of Land, F. R. D. 224, 234-235 (D. C. Cal., 1954);

18 C. J. S. 158.

These authorities and countless others all stand for the proposition that *a performance without consent of the owner cannot dedicate the owner's property rights*.

It is also incontestably the law that infringement is different from publication. Aside from the simple distinction pointed out above *i.e.*, publication requires *consent* and infringement involves *lack of consent*, the two concepts are fundamentally and completely different. Thus, from an early date, public performance of a song, by one who did not have the consent of the owner of the common law rights, constituted infringement.

Drone, *The Law of Property in Intellectual Productions*, 107 (1879):

“The owners’ common law rights are invaded when, without his consent, his manuscript is published in print, *when his dramatic or musical composition is publicly performed*, or when copies of his work of art are either publicly circulated or exhibited.” (Emphasis supplied.)

This rule, of course, forms the basis of many of the California common law right decisions. See, *e.g.* *Barsha v. Metro-Goldwyn-Mayer*, 32 Cal. App. 2d 556, 90 P. 2d 371 (1939); *Golding v. R.K.O. Pictures, Inc.*, 35 Cal. 2d 690, 221 P. 2d 95 (1950).

But it is equally clear that public performance of a musical or dramatic composition *by the owner of the common law rights, or with his consent*, does not dedicate.

Shafter, *Musical Copyright* 130, 131 (1939):

“*Performance* is one of those acts which do not result in loss of rights. Performance of a musical or dramatic work is not tantamount to publication—a rule observed throughout the world.”

Golding v. R.K.O. Pictures, Inc., 35 Cal. 2d 690, 693, 221 P. 2d 95, 96 (1950);

Ferris v. Frohman, 223 U. S. 424, 435-436, 31 S. Ct. 263, 266, 56 L. Ed. 492, 497 (1912):

“At common law, the public performance of the play is not an abandonment of it to the public use. *Macklin v. Richardson*, 2 Ambl. 694, 7 Eng. Rul. Cas. 66; *Morris v. Kelly*, 1 Jac. & W. 481, 21 Revised Rep. 216; *Boucicault v. Fox*, 5 Blatchf. 87,

97, Fed. Cas. No. 3,441; *Palmer v. DeWitt*, 2 Sweeny, 530, 47 N. Y. 532, 7 Am. Rep. 480; *Tompkins v. Halleck*, 133 Mass. 32, 43 Am. Rep. 480. Story states the rule as follows: 'So, where a dramatic performance has been allowed by the author to be acted at a theater, no person has a right to pirate such performance, and to publish copies of it surreptitiously; or to act it at another theater without the consent of the author or proprietor; for his permission to act it at a public theater does not amount to an abandonment of his title to it, or to a dedication of it to the public at large.' 2 Story, Eq. Jur. §950."

McCarthy & Fischer, Inc. v. White, 259 Fed. 364, 365 (D. C. N. Y., 1919) (per A. N. Hand, J.):

"It is, however, well settled that the public performance of a dramatic or musical composition is not an abandonment of the composition to the public. *Ferris v. Frohman*, 223 U. S. at page 435, 32 Sup. Ct. 263, 56 L. Ed. 492; *Crowe v. Aiken*, 2 Biss. 208, Fed. Cas. No. 3,441; *Palmer v. DeWitt*, 47 N. Y. at page 543, 7 Am. Rep. 480; *Thomas v. Lennon* (C.C.) 14 Fed. at page 851; *Carte v. Ford* (C.C.) 15 Fed. at page 442."

See also:

Patterson v. Century Productions, 93 F. 2d 489 (2nd Cir., 1937).

Publication is not in itself an issue on this appeal. The lower court specifically held that plaintiff's rights had *not* been lost by publication [R. 49-50]. Further citations on this point are therefore, unnecessary. The authorities set forth are sufficient to underscore the

difference between the concepts of infringement and dedication. *They demonstrate that defendants cannot rely on their own infringement, to constitute a dedication and loss to plaintiff of his valuable property rights.*

THIRD: The federal authorities cited by plaintiff are applicable. Defendants argue that federal cases decided under the copyright statute are inapplicable to a case involving common law copyright. A conclusive refutation of this argument is found by looking at the California "common law" literary property decisions. Time after time these decisions cite, rely on, and quote from cases decided under the federal statute.

See *e.g.*:

Weitzenkorn v. Lesser, 40 Cal. 2d 778, 789, 791, 256 P. 2d 947, 955, 956 (1953);

Stanley v. Columbia Broadcasting System, 35 Cal. 2d 653, 660, 661-662, 221 P. 2d 73, 77, 78, 80-81 (1950).

The general authorities are in accord.

34 *Am. Jur.* 448:

"In the first place, it may be observed, *there is no distinction between an infringement of right at common law and of the copyright under the statute in literary or artistic works.*"

Warner, *Radio and Television Rights*, 540 (1953):

"*Courts apply the same standards or tests for infringement for common law as for statutory copyright.*"

And this is especially true when the same specific right is in issue in the common law copyright case as in the federal case relied upon as authority. In one of the leading federal cases announcing the doctrine of multiple infringement, *Jewell-LaSalle Realty Co. v. Buck*, 283 U. S. 202, 204-205, 51 S. Ct. 407, 408, 75 L. Ed. 978, 980 (1931), the right involved was, in the words of Mr. Justice Brandeis, "*the monopoly of giving public performance.*"

This right exists also as a common law right. (*Bobbs-Merrill Co. v. Straus*, 147 Fed. 15, 18 (2d Cir., 1906), Aff'd 210 U. S. 339, 28 S. Ct. 722, 52 L. Ed. 1086 (1908); *Werckmeister v. American Lithograph Co.*, 134 Fed. 321, 323, 324 (2nd Cir., 1904); Amdur, *Copyright Law and Practice*, 62-64 (1936).) This is one of the many common law rights asserted by plaintiff in this case. The federal cases may not be distinguished simply by saying that they were decided under a statute, when there is no applicable distinction in the rights involved or the nature of the invasion of those rights. The federal precedents are persuasive.

* * * * *

Each step in defendant's argument crumbles. It is completely without support in reason or authority.

We submit that, for the reasons stated, and based on the authorities cited, the judgment should be reversed.

II.

Plaintiff's Claims, Based on Infringement of His Common Law Rights, Against Defendant Music Publisher (BMI), Defendant Record Companies, and Defendant Broadcasting Companies, Are Not Barred by Any Statute of Limitations.

It is basic that no statute of limitations begins to run until a cause of action accrues to the plaintiff.

California Civil Code, Section 312:

“Civil actions, without exception, can only be commenced within the periods prescribed in this title, *after the cause of action shall have accrued*, unless wherein special cases, a different limitation is prescribed by statute.” (Emphasis supplied.)

Irvine v. Bossen, 25 Cal. 2d 652, 658, 155 P. 2d 9, 13 (1944):

“It is a fundamental principle in determining when the statute of limitation commences to run, that it runs from the time a cause of action accrues and it invariably accrues when there is a remedy available. (16 Cal. Jur. 488-490.) Hence, the pertinent inquiry is, the nature of the remedies available to the bondholder.”

Lubin v. Lubin, 144 A. C. A. 898, 906 (1956):

“It is hornbook law that the statute of limitation begins to run in any case upon the accrual of a cause of action, *which means a present right to sue thereon*. (*Maguire v. Hibernia S. & L. Soc.*, 23 Cal. 2d 719, 733 [146 P. 2d 673, 151 A. L. R. 1062].)” (Emphasis supplied.)

See also:

16 Cal. Jur. 488-490.

This action was commenced on January 19, 1955 [R. 14]. *Neither* defendant BMI, *nor* any of the defendant record companies, *nor* any of defendant broadcasting companies, committed any infringing act until *after* February 1, 1953. Defendant BMI, by its own admission, first infringed on February 6, 1953 [R. 42-43]. The defendant record companies and broadcasting companies began their infringements on February 1, 1953 [R. 7-8, 9-10]. Insofar as these defendants are concerned, they have committed no tort except within the two-year limitations period. No cause of action had accrued to plaintiff against them, except within that period, and no statute of limitations bars plaintiff's present action against them.

These defendants argued in the lower court that because they printed, sold and performed the same song as was performed in the motion picture, *Moulin Rouge*, their rights were "derived from and subordinate to the rights of the defendants Romulus and United Artists Corporation" Defendants' Answer to Plaintiff's Reply Brief . . . p. 8, lines 29-30), and that, therefore, plaintiff's cause of action was "to the same extent barred by the statute of limitations" (*id.*, p. 9, line 4.)

This argument is based on the fallacy that plaintiff has no remedy against Romulus and United Artists for *subsequent* torts committed solely by such defendants or which they authorize, or commit jointly in conjunction with other defendants. It must fall for that reason alone.

In addition, it should be pointed out that the argument is erroneous for several other reasons as well:

1. There is nothing in the record which establishes, or even suggests that the rights, if any, of the other defendants were derivative or subordinate. While these

defendants argue from the nature of the infringing sheet music [Ex. B] that the infringing song used by them came from the film, there is nothing that establishes or tends to establish that these defendants or any of them derived their rights, if any, from the defendant producer, Romulus, or the defendant distributor, United Artists. For aught that appears in the record, all of these defendants may have obtained an invalid license from the "composer" of the infringing work, or they may have infringed without putative rights of any sort. In any event, on this review plaintiff is entitled to "the most favorable inferences" which can be drawn from the pleadings (*Sidebotham v. Robison*, 216 F. 2d 816, 831 (9th Cir., 1955)) and defendants are not entitled to compel the Court to accept any inference such as the one on which this argument is predicated, based on surmise and conjecture.

2. Even if these defendants had copied from the work which appeared in the film it would not excuse them.

Wihtol v. Wells, 231 F. 2d 550, 553 (7th Cir., 1956):

"Defendant claims that he obtained the words which he used in his song from a poem composed by one Anna Johnston entitled 'My God and I' published in a church bulletin dated October 31, 1949. As this date is long after plaintiff's work had become widely and favorably known, it doesn't make much difference whether defendant copied from plaintiff or whether defendant copied from Johnston who copied from plaintiff."

3. As a matter of law, even if the "rights" of these defendants to use the infringing composition are "derivative" from defendants Romulus and United Artists, their acts of infringement are nevertheless individual acts which

constitute separate infringements and give rise to separate causes of action.

Encore Music Publications v. London Film Productions, 89 U .S. P. Q. 501, 28 Copyright Bulletin 144 (D. C. N. Y., 1951).

See, also:

Northern Music Corp. v. King Record Distributing Co., 105 F. Supp. 393, 400-401, 401-402 (D. C. N. Y., 1952).

As the defendants freely admitted in the Court below, each infringement is a separate tort. For the reasons set out in Point I, the decisions establishing this rule are persuasive in the instant case.

The only other contention of these defendants is that set forth, *supra*, under Point I, *i.e.*, that infringement by defendants Romulus and United Artists constituted a dedication by plaintiff of his rights. All of the reasons we have previously set forth to demonstrate the error of this argument apply equally as to these defendants. The same fundamental defects still destroy defendants' argument. Performance, without consent of the owner of the common law rights constitutes an infringement by the defendant and is not a dedication or an abandonment by the plaintiff.

As to these defendants, the following additional reasons negate any suggestion that infringement resulted in loss of rights by plaintiff:

1. Defendants have mistaken the effect of the statute of limitations. They have confused the running of a statute of limitations with a dedication. The statute of limitations operates to bar the remedy. It does not affect plaintiff's rights.

Western Coal & Mining Co. v. Jones, 27 Cal. 2d 819, 828, 167 P. 2d 719, 724 (1946):

“The general rule is that the running of the statutory period does not extinguish the cause of action, but merely bars the remedy. That is the law in California.”

Mitchell v. Auto. Etc. Underwriters, 19 Cal. 2d 1, 4, 118 P. 2d 815, 817 (1941):

“The bar of the statute of limitations, however, affects the remedy only and does not impair the obligation.”

Moreover, the privilege of invoking the statute is personal.

Union Sugar Co. v. Hollister Estate Co., 3 Cal. 2d 740, 744, 47 P. 2d 273, 275 (1935);

Frelight v. McGrew, 124 Cal. App. 405, 410, 12 P. 2d 965, 967 (1932).

Thus, the only possible effect of plaintiff's failure to assert his rights against defendants Romulus and United Artists would be to give Romulus and United Artists a *personal defense which would only partially bar plaintiff's remedies or some of them* (see *supra*, Point I). It would not affect plaintiff's rights in his property or bar causes of action arising from infringements by other defendants.

2. Whatever application the statute has in this case, it could not affect plaintiff's remedies in any way until two years after the first infringement by defendants Romulus and United Artists. Therefore plaintiff's remedies against defendants Romulus and United Artists *were not barred on February 1, 1953, or February 6, 1953*. Additional causes of action accrued to plaintiff against all remaining defendants on these later dates.

The California statute of limitations runs only from the date the cause of action accrues. California Code of Civil Procedure, Section 312, quoted *supra*. The statute, therefore, had not run on these claims when plaintiff started the instant action and plaintiff is entitled to pursue all of his remedies against these defendants.*

Thus, under any analysis, a cause of action arose in plaintiff's favor against these defendants. That cause of action was not barred upon any theory of an applicable statute of limitation. Actually, this case is simple insofar as it involves infringement of plaintiff's common law rights in his literary or musical property by defendant music publisher (BMI), the defendant record companies, and the defendant broadcasting companies. No amount of argument and no amount of verbiage can change the fact that none of these defendants committed an infringing act before February 1, 1953, and that the complaint was filed within two years after date.

For these reasons, the judgment should be reversed.

III.

Plaintiff's Remedies Against Defendants, Based on Unfair Competition, Are Not Barred.

Plaintiff's second count, against all defendants', is based on unfair competition [R. 9-11]. Plaintiff alleges that both his composition and its title had acquired a secondary meaning [R. 10]. Plaintiff alleges that by defendants' appropriation of his composition and its title, the general public and the entertainment industry have been "confused and misled" [R. 10-11].

*In passing, it should be mentioned that the torts of these defendants are, in any event, continuing and repeated for the same reasons set forth in Point I, *supra*.

Here the element of public and industry confusion places the action on an entirely different basis from an action for infringement of "common law copyright."

Thus in *Leo Feist, Inc. v. Song Parodies*, 146 F. 2d 400 (2nd Cir., 1944), it was held that a prior action for unfair competition which plaintiff lost did not permit the defendant to successfully plead *res adjudicata* in a subsequent suit for copyright infringement although "the very songs involved in the actions here" (p. 401) were those in issue in the unfair competition case. The reason for the court's ruling was that the prior state court decision rested "on the finding that purchasers would not be misled, a fact unimportant in the copyright action." (P. 401.)

See also *Collins v. Metro-Goldwyn Pictures Corporation*, 106 F. 2d 83, 85 (2nd Cir., 1939), holding that "in our opinion the claim for copyright infringement involved a different transaction from that for unfair competition and will raise entirely distinct issues on appeal." This holding has been twice approved by the Supreme Court.

Reeves v. Beardall, 316 U. S. 283, 284, 62 S. Ct. 1085, 1087, 86 L. Ed. 1478, 1479 (1942);

Sears, Roebuck & Co. v. Mackey, 351 U. S. 427, 438, 76 S. Ct. 895, 901, 100 L. Ed. (Adv.) pp. 780, 788 (1956).

The deception and confusion of the entertainment industry and the public is thus an important and distinguishing element in plaintiff's case. See also *Curtis v. 20th Century Fox Film Corp.*, 140 Cal. App. 2d 461, 464, 465, 295 P. 2d 62, 64 (1956).

In so far as unfair competition by appropriation of the substance of plaintiff's song is concerned, the complaint alleges no specific date on which public or industry confusion commenced. The complaint states only that this confusion and deception began "during the year 1953" and has been continuous to the date the complaint was filed [R. 10].

Defendants have supplied no date, by means of affidavit or otherwise. They might have done so under Federal Rules of Civil Procedure, Rule 12(b). Nor did defendants move for a more definite statement under Federal Rules of Civil Procedure, Rule 12(e).

Insofar as appropriation of title is concerned, the confusion and misleading of the public and the industry began on February 1, 1953 [R. 11], within the two year period.

Defendants have in no way attempted to sustain their statute of limitations defense to plaintiff's claim based on unfair competition. On this appeal plaintiff is entitled to have every inference resolved in his favor, *Sidebotham v. Robison*, 216 F. 2d 816, 831 (9th Cir., 1955), and to have the case reviewed "in the aspect most favorable to the plaintiff and most unfavorable to the defendant."

Woods v. Hillcrest Terrace Corporation, 170 F. 2d 980, 984 (8th Cir., 1948).

There is thus no basis upon which it can be held that the statute applies.

Vassere v. Joerger, 10 Cal. 2d 689, 693, 76 P. 2d 656, 658 (1938):

" . . . '[A] demurrer on the ground of the bar of the statute of limitations does not lie where the complaint merely shows that the action *may* have been

barred. It must affirmatively appear that, upon the facts stated, the right of action is *necessarily* barred. (*Pike v. Zadig*, 171 Cal. 273, 277, 152 Pac. 923; *Curtiss v. Aetna Life Ins. Co.*, 90 Cal. 245, 250, 27 Pac. 211, 25 Am. St. Rep. 114.'” (Emphasis supplied.)

Miller v. Brown, 107 Cal. App. 2d 304, 307, 237 P. 2d 320 (1951):

“Hence, a demurrer on the ground that the cause of action was barred by the statute of limitations could not be sustained as it must affirmatively appear on the face of the complaint that it is barred and not merely that it may be barred. (*Pike v. Zadig*, 171 Cal. 273, 152 P. 923.)”

Defendants have failed to carry their burden of showing that the statute must necessarily have run. They are not entitled to a judgment of dismissal.

It should also be noted that the tort of unfair competition of the nature here alleged is a continuing tort and every continuance or repetition gives rise to a fresh cause of action.

See:

4 *Callmann, Unfair Competition and Trademarks*, 1784, n. 2 (1950).

Curtis v. 20th Century Fox Film Corp., 140 Cal. App. 2d 461, 464-465, 295 P. 2d 62, 64 (1956), where the court said:

“Assuming, without deciding, that the wrongful act alleged, i.e., the use of plaintiff's title, was continuous and repeated and that every continuance and repetition gave rise to a fresh cause of action (see 16 Cal. Jur. 524, §123). . . .” (Emphasis supplied.)

See also the cases cited, *supra*, Point I setting forth the California decisions on continuing and repeated torts. Here, as there, defendants could have discontinued their tortious conduct at any time. There was no “permanency” in defendants’ conduct. The tort was, therefore, continuing, and under any analysis, plaintiff is not barred by the statute of limitations.

Trombley v. Kolts, 29 Cal. App. 2d 699, 708, 85 P. 2d 541, 545 (1938);

Phillips v. City of Pasadena, 27 Cal. 2d 104, 107-108, 162 P. 2d 625, 626-627 (1945);

Kafka v. Bozio, 191 Cal. 746, 218 Pac. 753 (1923);

Carbine v. Meyer, 126 Cal. App. 2d 386, 390, 272 P. 2d 849, 853 (1954);

34 *Am. Jur.* 127.

For the reasons stated, the judgment rendered on the second count must be reversed.

IV.

The Equitable Relief Sought by Plaintiff in His Third Count Is Not Barred by the California Statute of Limitations.

The third count raises the issue of the applicability of the sole statute relied on by defendants [Sec. 339.1, Code Civ. Proc., R. 15], to claims for the equitable relief of injunction and accounting.

Plaintiff seeks this equitable relief based upon allegations of defendants’ intent to continue infringing acts in the future of the same nature as the past infringements alleged in plaintiffs first and second counts. These counts set forth claims for infringement of common law rights in literary property and for unfair competition.

In connection with his claims for equitable relief plaintiff makes three separate contentions:

- A. Assuming Arguendo, That Plaintiff's Equitable Rights and Remedies Could Be Barred by California Code of Civil Procedure 339.1 which Affects Legal Rights and Remedies, Plaintiff May, Because His Legal Rights and Remedies Are Not Barred, Enforce His Equitable Rights and Remedies Against Defendants.

We believe that the antecedent portions of this argument conclusively establish that none of plaintiff's legal rights here in issue were, on January 19, 1955, barred by California's limitation statutes except such damages as may have occurred *prior* to January 20, 1953, and for which Romulus and United Artists were solely liable. Therefore, even if equitable remedies are subject to the same statute of limitations which affects the legal rights and remedies at issue herein, plaintiff is entitled to the equitable relief he seeks. Defendants have made no showing of special or "exceptional" (*Lux v. Haggin*, 69 Cal. 255, 270, 4 Pac. 919 (1886)), circumstances of prejudice which could call for the imposition of any equitable bar and no such circumstances exist in this case.

Lux v. Haggin, 69 Cal. 255, 267, 4 Pac. 919 (1886):

"Where an express statute of limitations applies to a suit in equity, mere delay to commence a suit for a period less than that of the statute of limitations is never a reason for dismissing the proceeding, and a party cannot be refused a hearing if he shall bring his action within the prescribed period."

See also:

- Weber v. Marine Cooks & Stewards Assn.*, 123 Cal. App. 2d 328, 331, 332, 266 Pac. 801 (1954);
Hugill v. Keene, 204 Cal. 381, 383, 268 Pac. 624 (1928);
Meige v. Pinkham, 159 Cal. 104, 111-112, 112 Pac. 883 (1910);
Boone v. Templeman, 158 Cal. 290, 299, 110 Pac. 947 (1910);
First Nat. Bank v. Stansbury, 118 Cal. App. 80, 88-89, 5 P. 2d 13 (1931).

B. Even If Plaintiff's Legal Remedies Are Barred, His Right to the Equitable Remedy of Injunction Has Not Been Lost.

Even if it be assumed, *arguendo*, that plaintiff's legal rights, or some of them are barred—and we submit that the preceding argument (Points I, II, III, *supra*) conclusively establishes that such rights are *not* barred—yet such a loss does not work a forfeiture of plaintiff's equitable rights.

Insofar as the third count asks for injunctive relief, the applicable statute of limitations is found in California Code of Civil Procedure, Section 343:

“An action for *relief* not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued.” (Emphasis supplied.)

There is no specific code provision in California which governs suits for equitable relief of the nature sought herein. From a very early date, California has applied Code of Civil Procedure, Section 343, to suits for injunction.

Pillar v. Southern Pacific R.R. Co., 52 Cal. 42, 44 (1877):

“Thus reading the statute, the four years’ limitation of Sec. 343 applies to all suits in equity not strictly of concurrent cognizance in law and equity.”

In *Dore v. Thornburgh*, 90 Cal. 64, 27 Pac. 30 (1891), the Court reaffirmed the doctrine of these cases, stating that Code of Civil Procedure, Section 343 applied “‘to all suits in equity not strictly of concurrent cognizance in law and equity’ ” (p. 67) and extended its applicability to certain actions at law, as well.

The rule was again reaffirmed in *Freeman v. Donohoe*, 65 Cal. App. 65, 223 Pac. 431 (1923).

In *Lux v. Haggin*, 69 Cal. 255, 4 Pac. 919 (1886), this rule was specifically applied to a suit for an injunction. The Court there held that Section 343 was the limitation statute applicable to injunctive relief. The court further held that plaintiff’s suit was timely.

Exactly the same rule has been applied in New York which, like California, pioneered the development of the Codes and the abolition of separate courts of law and equity. Section 53 of the New York Civil Practice Act (formerly New York Code of Civ. Proc., Sec. 388), reads as follows:

“An action, the limitation of which is not specifically described in this article, must be commenced within ten years after the cause of action accrues.”

It was early decided that this statute, and *not* the statute relating to the legal rights and remedies, was the applicable statute *if equitable relief was sought*.

Ford v. Clendenin, 215 N. Y. 10, 16, 109 N. E. 124, 126 (1915):

“The provision of section 388 of the Civil Code of Procedure (now section 53) quoted applies to any and every form of equitable action.”

In re Horowitz' Will, 114 N. Y. S. 2d 700, 706 (1952):

Sec. 53 “applies to any and every form of equitable action.”

Peters v. Delaplaine, 49 N. Y. 363, 369-372 (1872);

Brinckerhoff v. Bostwick, 99 N. Y. 185, 193 (1885);

Treadwell v. Clark, 190 N. Y. 51, 59 (1907);

People v. Minuse, 273 App. Div. 457, 78 N. Y. S. 2d 309 (1948).

A suit for an injunction is, of course, not a case “strictly of concurrent cognizance in law and equity.” The question was settled in *Lux v. Haggin*, *supra*, 69 Cal. 255, 4 Pac. 919 (1886), where the court specifically applied Section 343 to an injunction matter and held that plaintiffs’ claim was not barred. The issue is further settled by the California rule that the distinction between law and equity jurisdiction, and the difference between the exclusive and concurrent jurisdiction of equity is, fundamentally, “in the mode of relief” which can be granted by the two different types of courts.

Philpott v. Superior Court, 1 Cal. 2d 512, 515-516 (1934).

See also:

1 *Pomeroy's Equity Jurisprudence* 186 (5th Ed.).

The form of relief here sought is an injunction. It requires no citation of authority to establish the proposition that injunctive relief always was *exclusively* within the domain of the equity courts. It constitutes relief granted *only* by a court of equity. Insofar as the third count of the present complaint seeks injunctive relief—relief a court of law *never* had jurisdiction to grant—the case is within the *exclusive* jurisdiction of the equity court.

The New York courts, under statutes similar to California's, have adopted the rule here contended for by plaintiff.

Hanover Fire Ins. Co. v. Morse D. D. & R. Co., 270 N. Y. 86, 189-190 (1936):

“If relief may be had at law in an action for damages and in equity for a rescission of a contract on the ground of fraud with a reconveyance of the land and an accounting for profits, the action in equity is subject to the 10-year limitation though the action for damages is barred under the six-year statute.” (Citing cases; emphasis supplied.)

See also, *Curtice v. Dixon*, 73 N. H. 393, 394, 62 Atl. 492 (1905). In an action to require cancellation and surrender of a contract obtained by fraud and undue influence and for an accounting thereunder, the court said:

“The mere fact that an action at law for damages occasioned by the fraud might be maintained does not deprive equity of its otherwise *exclusive jurisdiction*.” (Italics ours.)

In *McIsaac v. McMurray*, 77 N. H. 466, 468, 93 Atl. 115, 116 (1915), the Supreme Court of New Hampshire said:

“Cases in which the *remedy* sought and obtained is one which equity courts alone are able to confer must, upon any consistent system of classification, belong to the *exclusive jurisdiction* of equity.” (Italics ours.)

See also:

Myers v. Sierra Valley, etc. Ass’n., 122 Cal. 669, 674.

Aside from these authorities, the California rule, as pointed out above, holds that the four-year statute applies “to all suits in equity not *strictly* of concurrent cognizance in law and equity.” (*Dore v. Thornburgh, supra*, 90 Cal. 64, 67.) The word “strictly,” if it is to be given any content, should mean that courts of law and courts of equity do not take concurrent cognizance of, or have concurrent jurisdiction over, suits in which an *exclusively* equitable remedy, such as an injunction, is sought.

Under the California law, therefore, the four year statute, Code of Civil Procedure, Section 343, is, in any event, applicable to plaintiff’s claim for injunctive relief, and his claim for such relief is not barred by any statute of limitations.

C. The Claim For An Accounting is Not Barred by Any California Statute of Limitations.

For the reasons set forth above, California Code of Civil Procedure, Section 343 is applicable to all claims for equitable relief “not *strictly* of concurrent cognizance in law and equity,” for the reason that Section 343 governs equitable claims.

A cause of action for an accounting has sometimes been included in enumerations of cases of strictly concurrent jurisdiction. But such a claim for an accounting, whether it be considered an action at law, or suit in equity, has been repeatedly held *to be amenable only to the four year statute*, Code of Civil Procedure, Section 343.* The reason is different than in a suit seeking injunctive relief. The reason is that the action or suit, whether it be at law or in equity, is one for which no provision is made by any specific code section.

The four year statute, therefore, applies.

Howard v. Throckmorton, 59 Cal. 79 (1881);

Cook v. Ceas, 147 Cal. 614, 82 Pac. 370 (1905);

Allsopp v. Hendy Machine Works, 5 Cal. App. 228, 90 Pac. 39 (1907);

Freeman v. Donohoe, 65 Cal. App. 65, 223 Pac. 431 (1923);

Austin v. Jones, Inc., 30 Cal. App. 2d 362, 86 P. 2d 379 (1939).

*In the *Italiani* case, 45 Cal. App. 2d 464, 114 P. 2d 370 (1939), plaintiff's complaint contained a demand for an accounting, but *prior to trial, plaintiff abandoned this claim*. The appeal in the *Italiani* case was on the judgment roll. The judgment recites, "Upon hearing of defendant's motion to compel an election *plaintiff elected to proceed at law for damages in lieu of proceeding in equity for an accounting*." The fact of this waiver was specifically directed to the attention of the state appellate court in Respondents' Reply (*sic*) Brief, addendum, p. 2: "At the hearing on this motion [to compel an election] appellant elected to proceed at law before a jury for damages rather than to ask for an accounting of profits, and expressly waived any right to an accounting of profits. Accordingly, the action proceeded *solely as one at law*, to be tried before a jury."

Estate of McCabe, 80 Cal. App. 2d 823, 826, 183 P. 2d 72, 75 (1947):

“The general rule is well established that actions in equity, including proceedings for an accounting, where a specific and definite provision has not otherwise been made in the code, are governed by the provisions of section 343, Code of Civil Procedure, a four-year statute, as being actions ‘for relief not hereinbefore provided for.’ ‘(Lux v. Haggin, 69 Cal. 255 (4 P. 919, 10 P. 674); McArthur v. Blaisdell, 159 Cal. 604 (115 P. 52); Nougues v. Newlands, 118 Cal. 102 (50 P. 386); Freeman v. Donohoe, 65 Cal. App. 65 (223 P. 431); Wenban Estate, Inc. v. Hewlett, 193 Cal. 675 (227 P. 723).)’ ”

See also:

Big Sespe Oil Co. v. Cochran, 276 Fed. 216, 221-222 (9th Cir., 1921), applying California Law.

It is clear, therefore, that in any event plaintiff is entitled to an injunction and an accounting as against all defendants.

Conclusion.

For the reasons stated, the judgment should be reversed.

Respectfully submitted,

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No. 15188

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEO MANTIN,

Appellant,

vs.

BROADCAST MUSIC, INC., a corporation, *et al.*,

Appellees.

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No. 15188

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEO MANTIN,

Appellant,

vs.

BROADCAST MUSIC, INC., a corporation, *et al.*,

Appellees.

APPELLEES' ANSWERING BRIEF.

Preface.

This is not a copyright infringement case. It is a diversity case arising under California law complaining of an alleged appropriation from a California citizen of common law intellectual property, namely a musical composition, and the questions to be decided on this appeal are (1) whether or not under the law of California a complaint for the taking of such property is barred by the two year California statute of limitations under the rule announced in *Italiani v. Metro-Goldwyn-Mayer Corp.*, 45 Cal. App. 2d 464, 114 P. 2d 370 (1941), and (2) whether or not, under the law of California plaintiff-appellant has lost all rights in such property by having made the same public. Appellant hereafter is referred to as plaintiff and appellees hereafter are referred to as defendants.

Jurisdictional Statement.

This is an appeal from a judgment of dismissal [R. 48-51] made and entered pursuant to Federal Rules 9(f) and 12(b)(6) in the United States District Court for the Southern District of California, Central Division, Honorable Peirson M. Hall, Judge, decided solely on the ground of the statute of limitations. The judgment followed a motion to dismiss [R. 14-16] bottomed on the propositions *inter alia* (1) that plaintiff's causes of action and each of them, if any, against the defendants, and each of them, are barred by the two year statute of limitations of the state of California, namely by the provisions of California Code of Civil Procedure, Section 339, Subdivision 1, and (2) that it affirmatively appears on the face of the complaint that during the years since plaintiff's alleged composition in 1922 of the musical property here involved he has made the same public under the laws of California, namely Civil Code, Sections 980 and 983, as such sections existed subsequent to 1922 and up to the time of the alleged taking on December 23, 1952.

While for the purposes of the motion to dismiss only, the Court below adjudged that plaintiff had not published his musical composition within the meaning of the law of the state of California [R. 49-50], the defendants may, without taking a cross-appeal, urge in support of the judgment below any ground relied on by them in the Court below, *Gallagher & Speck, Inc. v. Ford Motor Company*, 226 F. 2d 728 (7 Cir., 1955), and defendants do urge in support of said judgment their contention urged below that the face of the complaint shows that plaintiff has made his alleged composition public property.

Jurisdiction below was based upon diversity of citizenship (28 U. S. C., Sec. 1332(a)(1)). The complaint avers that plaintiff is a California citizen [R. 3] and that the defendants are residents and citizens of states other than the state of California [R. 3-5]. The complaint also alleges that the matter in controversy exceeds the sum or value of three thousand dollars (\$3,000.00), exclusive of interest and costs [R. 5].

This Court has appellate jurisdiction, under 28 U. S. C., Sections 1291, 1294(1), to review the final judgment entered against plaintiff. While, following stipulation of counsel, the District Court Judge signed a certificate of finality pursuant to Federal Rule 54(b) [R. 56-57], the certificate would seem to be surplusage because the judgment of dismissal decreed that plaintiff's causes of action, and each of them, are barred by the statute of limitations.

Statement of the Case.

Defendants do not controvert appellant's statement of facts other than as follows: Plaintiff's conclusion that he has never in any form published his composition [Complaint, Par. VI, R. 6], is not consistent with his allegation of the following facts: He is a professional entertainer [Complaint, Par. I, R. 3]. He has sung and performed his composition in night clubs, music halls, theaters, hotels and other places of amusement and entertainment in the United States, England, France and many other countries throughout the world [Complaint, Par. VI, VII, R. 5-6] for more than thirty (30) years, by reason of which thousands of persons in the entertainment industry and hundreds of thousands of persons constituting the general public have attached a secondary

meaning to such composition and its title, identified with plaintiff [Complaint, Par. II, R. 10].

Defendants also desire to point out the following facts:

Incorporated into the complaint by reference and attached thereto as an Exhibit is a copy of defendants' song [Complaint, Par. XII, R. 9, 24-25]. The song in sheet music form shows on its face that its title is "SONG FROM MOULIN ROUGE" with smaller alternate title in parentheses below ("WHERE IS YOUR HEART"), and that it is the song from the picture "Moulin Rouge." The plaintiff alleges that the song incorporated and recorded in the motion picture [Complaint, Par. VIII, R. 7, Par. XII, R. 9] is the "said song" published, recorded and broadcast by the defendants other than the motion picture distributor and producer [Complaint, Par. IX-XII, R. 7-9].

An examination of the lyrics of plaintiff's song [R. 26] with those of defendants' song [R. 25] demonstrates that the only common matter is the phrase "Where Is Your Heart." The record shows that commencing with 1921 (plaintiff composed his song in 1922) there have been at least seven (7) copyright registrations for that title or a variation thereof [R. 35-41] other than the registration covering defendants' song [R. 42-43].

The Complaint does not allege access to plaintiff's composition by defendants in the traditional sense. Instead, in conjunction with the allegation of plaintiff's performance of his song in places of entertainment throughout the world it is alleged merely that defendants have had full knowledge of plaintiff's rights [Complaint, Par. VII, R. 6].

Questions Presented.

Defendants believe that there are two questions to be decided on this appeal:

(1) Where a complaint alleges that on December 23, 1952 certain defendants first released and exhibited and thereafter continuously released and exhibited a motion picture entitled "Moulin Rouge", in which was incorporated and recorded a song entitled "THE SONG FROM MOULIN ROUGE" with an alternate title "WHERE IS YOUR HEART", and which song substantially copied and appropriated the words and music of plaintiff's alleged original song entitled "WHERE IS YOUR HEART", which first date of release and exhibition of such motion picture was more than two (2) years prior to the filing of the complaint, and where other defendants within two (2) years of the filing of the complaint published in sheet music form or recorded on phonograph records or broadcast over the radio *a copy of the song recorded in the motion picture film*, under California law does the two (2) year statute of limitations, Code of Civil Procedure, Section 339, Subdivision 1, apply to forever bar an action against the motion picture producer, the motion picture distributor, the sheet music publisher, the recording companies and the broadcasting companies for appropriation or conversion of plaintiff's alleged common law intellectual property?

(2) Where the complaint shows on its face that plaintiff composed the song in 1922, that thereafter the plaintiff sang and performed his song in night clubs, music halls, theaters, hotels and other places of amusement or entertainment in the United States, England, France and many other countries throughout the world, that by reason of such widespread use, performance and singing

of his song by plaintiff for more than thirty (30) years *thousands of persons in the entertainment industry and hundreds of thousands of persons constituting the general public* have learned to identify plaintiff's song and the title thereof with plaintiff, did such activity over the years constitute a publication under the laws of the state of California, particularly Civil Code, Sections 980 and 983, as they existed between 1922 and the alleged appropriation on December 23, 1952?

Summary of Argument.

A. Statute of Limitations.

When an author chooses not to avail himself of statutory copyright, it is said that he has, under the common law, a property in his intellectual production before it has been published, namely the exclusive right to make the *first publication* of it. It also is said that this common law right of property in an author's intellectual production differs in no respect from any other form of personal property in the protection which the common law places about it. So the author in a proper case may obtain redress against anyone who deprives him of his intellectual property, as by, having improperly obtained it by some means, publishing it or otherwise using it without the author's consent. It is said that this intellectual property is governed by the same rules of transfer and succession and is protected by the same process and has the benefit of all the remedies accorded to other personal property insofar as applicable. And it follows, therefore, as we shall see, that this property must suffer from the same disabilities as other property, for example, the owner's right to sue for its conversion by others may become barred by the statute of limitations.

The common law rights in literary property in California have been codified in Sections 980 and 983 of the California Civil Code. Since this case must be decided under California law, it being a diversity case, and no statutory copyright being involved, any rights which the plaintiff has must be derived from the California code sections cited as they now exist and as they existed during the period in which plaintiff claims to have sung and performed his composition, namely since 1922.

While it is said that an author's common law rights are perpetual, the protection of a perpetual monopoly is contrary to historic American policy. In fact our Federal constitution expressly provides that Congress can only secure for a limited time to an author his copyright to his intellectual production. And although at one time an author's common law rights existed in England, in England today an author's common law rights have been abolished by statute. Congress similarly could abolish common law rights in the United States today, although it has expressly reserved those rights to the author of an unpublished work in our Federal copyright act. Likewise, a state legislature may legislate on the subject of an author's common law rights, even to the point of leaving an author remediless against an appropriator of his common law work.

It follows, therefore, since an author's common law rights in his intellectual production are property and governed generally by the laws of property, a state legislature may enact a specific statute of limitations which would bar any action against an alleged appropriator of an author's literary property after a certain period. Therefore, where the legislature has enacted a compre-

hensive scheme of statutes of limitation applicable to all kinds of actions including those based upon asserted rights in property, tangible or otherwise, the particular statute of limitations found by the courts of that state to be applicable to this species of property may forever bar an action against an alleged appropriator and those who derive their rights from him.

This result flows from the nature of an author's primary right to his unpublished intellectual work. This is the right to *first publish*. If *another first publishes it*, and thereby appropriates it, the wrong is complete and subsequent activity by the appropriator or those who derive their rights from him, adds nothing.

It also follows that if no action may be maintained against the appropriator for the *taking* of the intellectual property because of the bar of the statute of limitations, and, since this particular type of appropriation can be accomplished only by the publication of the intellectual property and the assertion of ownership therein by the appropriator, no action thereafter on account of such publication may be maintained against the appropriator for unfair competition or for an injunction or an accounting. There is but one wrong, an appropriation of intellectual property evidenced by the publication and asserted ownership thereof by another, and as against that other, and those claiming under him, action is barred forever by the statute of limitations.

B. Publication.

Plaintiff characterizes himself as a professional entertainer and composer residing in Los Angeles, California. He composed his song "WHERE IS YOUR HEART" in 1922 and has sung and performed the song in night clubs, music halls, theaters, hotels and other places of amusement and entertainment in the United States, England, France and many other countries throughout the world. By reason of his widespread use, performance and singing of his song for more than thirty (30) years in the places indicated, thousands of persons in the entertainment industry and hundreds of thousands of persons constituting the general public are well acquainted with it.

Plaintiff is a California citizen, the case arises under California law and therefore the question of publication must be decided under that law. In California, as elsewhere, common law rights are limited to unpublished works and all common law property rights in an intellectual production are lost on publication. We assert that the acts of the plaintiff in communicating his song as a professional entertainer to hundreds of thousands of persons of the general public for more than thirty (30) years in hotels, night clubs, theaters and other places of entertainment throughout the United States and the world constitutes a general publication under Section 983 of the California Civil Code and dedicates the work to the public.

This view is strengthened by plaintiff's allegations to the effect that defendants' access to his song was a result of his performance of it throughout the world.

ARGUMENT.

A. A Complaint Filed January 19, 1955 Alleging the Appropriation of Plaintiff's Common Law Intellectual Production by Publication More Than Two (2) Years Before, Namely on December 23, 1952, Is Barred by the California Two Year Statute of Limitations, California Code of Civil Procedure, Section 339, Subdivision 1, as to Each and All Purported Causes of Action.

1. The Decision in This Case Must Be Governed by the Law of California as Interpreted by Its Courts, and by No Other Law.

A complaint may be dismissed on motion under Federal Rules 9(f) and 12(b)(6) for failure to state a claim upon which relief may be granted where it appears on the face of the complaint that the alleged claim is barred by the statute of limitations.

Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated, Ltd., 185 F. 2d 196, 204 (9 Cir., 1950), *cert. den.*, 340 U. S. 943, 71 S. Ct. 506, 95 L. Ed. 680, *rehear. den.*, 351 U. S. 912, 71 S. Ct. 620, 95 L. Ed. 1349 (1951).

Since the jurisdiction of the court below is based upon diversity of citizenship, the applicable statute of limitations is the statute of limitations of the State in which the United States District Court is located, in this case—California.

Van Dyke v. Parker, 83 F. 2d 35 (9 Cir., 1936).

The rule applies equally in diversity cases whether the action is considered one at law or in equity.

Guaranty Trust Co. v. York, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945).

Furthermore the complaint here recites that plaintiff is a resident of California [R. 3]. It is apparent, therefore, that the decision in this case must be governed by the law of California as interpreted by its courts, and by no other law.

2. The California Statutes of Limitations Are Comprehensive and Apply to All Actions, Whether Legal or Equitable, Unless Expressly Excepted.

In California the legislature has expressly provided that

“civil actions, *without exception* can only be commenced within the periods prescribed in this title. after the cause of action shall have accrued, unless where, in special cases, a different relationship is prescribed by statute.” (Emphasis supplied.)

Cal. Code Civ. Proc., Sec. 312.

See

McGuire v. Hibernia Savings & Loan Society,
23 Cal. 2d 719, 733, 146 P. 2d 673, 680 (1944).

Subdivisions 335 to 363 of the California Code of Civil Procedure provide various limitations for all actions other than real property actions. These statutes of limitation thus apply to every conceivable type of legal, equitable, and statutory actions other than real property actions.

McGuire v. Hibernia Savings & Loan Society,
above, 23 Cal. 2d at p. 733, 146 P. 2d at p. 680;

Hartley Pen Co. v. Lindy Pen Co., 16 F. R. D.
149, 158 (S. D. Cal., 1954), and cases cited.

It also is the settled law of California that it is the nature of the right sued upon and not the form of action nor the relief demanded which determines the applicability of the particular California statute of limitations.

McGuire v. Hibernia Savings & Loan Society,
above, 23 Cal. 2d at p. 733, 146 P. 2d at p. 680.

At this point, therefore, we may summarize as follows:

a. This being a diversity case on appeal from a district court sitting in California, the law of California must be looked to for decision. That law provides for comprehensive statutes of limitation applicable to all kinds of actions, legal or equitable, with no exceptions other than exceptions specifically provided for, and this action is not such an exception.

b. It also is the law of California that it is the nature of the cause of action and not the form of the action nor the remedy sought which determines which particular statute of limitations should apply.

3. It Has Been the Settled Law in California for Almost 16 Years That an Action for the Appropriation of an Author's Common Law Intellectual Production and Its Publication by Another Is Barred by the Two-year Statute of Limitations.

Cal. Code Civ. Proc., Sec. 339, Subdivision 1;

Italiani v. Metro-Goldwyn-Mayer Corporation, 45
Cal. App. 2d 464, 114 P. 2d 370 (1941).

The action commences to run from the date of first publication by the appropriator and continuous publication thereafter within the two year period does not remove the bar of the statute.

California Code of Civil Procedure, Section 339, Subdivision 1, provides in pertinent part as follows:

“§339. [Within two years.] Within two years:

“1. An action upon a contract, obligation or *liability not founded upon an instrument of writing*. other than that mentioned in subdivision two of section three hundred thirty-seven of this code; . . .”
(Emphasis supplied.)

The California law on the subject of the applicability of the above statute of limitations to an action for alleged plagiarism of a common law intellectual property is contained in the decision of *Italiani v. Metro-Goldwyn-Mayer Corporation*, above cited. In that case the motion picture producer, Metro-Goldwyn-Mayer Corporation, and the motion picture distributor and exhibitor, Loew's Incorporated, were alleged to have unlawfully appropriated and converted to their own use plaintiff's motion picture scenario and to have distributed and exhibited the scenario in a motion picture photoplay *continuously* within three (3) years preceding the filing of the complaint. [See 45 Cal. App. 2d at p. 465, 114 P. 2d at p. 371, and R. 27-35.] The District Court of Appeal held that an action for the appropriation or theft of incorporeal intellectual production is a tort action (this holding was approved by the Supreme Court of California in *Weitzenkorn v. Lesser*, 40 Cal. 2d 778, 784, 795, 256 P. 2d 947, 953, 959 (1953)), that it is settled law that the word “liability” as used in Code of Civil Procedure, Section 339, Subdivision 1, includes responsibility for torts not specifically mentioned in other statutes of limitation, hence the two year section, Code of Civil Procedure, Section 339, Subdivision 1, applied to an appropriation of an author's common law work.

On page 18 of Appellant's Opening Brief, it is argued that the court in the *Italiani* case failed to consider the question of continuous exhibition. It is submitted that this statement is patently incorrect for the following reasons:

a. The District Court of Appeal specifically quoted in its opinion a portion of the amended complaint reciting *continuous exhibition* within three years preceding filing of the complaint as follows:

“‘that within three years from the filing of the complaint “plaintiff is informed and believes and upon such information and belief alleges that the defendants and each of them, without the knowledge, consent or authority of or from the plaintiff, *and continuously during said time*, did deliberately and unlawfully appropriate and convert to their own use plaintiff's said literary composition and moving picture scenario, and said defendants did, for a profit, reproduce, sell, *distribute and exhibit* the same in a sound and talking motion picture photoplay entitled and designated ‘O'Shaughnessy's Boy.’”’” (Emphasis supplied.) (25 Cal. App. 2d at p. 465, 114 P. 2d at p. 371.)

b. The amended complaint in the *Italiani* case distinctly shows that continuous exhibition by the defendants therein was an integral part of the cause of action [see Par. VII, R. 34, and see Par. VIII, at R. 31 where it is alleged that “defendants continue to release, distribute and exhibit said motion picture photoplay throughout other parts of the world”].

c. The *Italiani* case went up after a demurrer to the amended complaint was sustained without leave to amend, a procedure akin to that at bar. It must be assumed that

the District Court of Appeal considered the allegation of continuous exhibition in reaching its decision. As the Supreme Court of California has said, on such an appeal pleadings "must be read as a whole and each part must be given the meaning that it derives from the context wherein it appears."

Speegle v. Board of Fire Underwriters, 29 Cal. 2d 34, 42, 172 P. 2d 867, 872 (1946).

d. The District Court of Appeal clearly recognized that it was dealing with a common law intellectual property by referring to 13 Corpus Juris, page 948, section 5(a) for a definition of an intellectual production, specifically a scenario. See

Italiani v. Metro-Goldwyn-Mayer Corp., 45 Cal. App. 2d at p. 466, 114 P. 2d at p. 372.

The subsection in Corpus Juris cited deals with the common law right of property in intellectual productions. Furthermore, the plaintiff in the *Italiani* case himself characterized his rights in his scenario as "common law literary rights" [R. 29].

4. An Appropriation of a Common Law Intellectual Work Must Clearly Be Distinguished From Infringement of Statutory Copyright.

This court must not be misled by the phrase "common law copyright". No such copyright exists. The only right to make and vend copies, *i. e.*, true "copyright", exists solely by virtue of statute, namely the Federal Copyright Act, 17 U. S. C. A., Section 1, *et seq.* The statute provides, Title 17 U. S. C. A., Section 101, that every unauthorized copy of a *copyrighted* work or every unauthorized delivery of a *copyrighted* lecture, sermon or address or every unauthorized performance of a *copy-*

righted dramatic or musical composition is an infringement. But the act, by its own terms, is applicable only to infringement of the statutory copyright.

Contrast the common law rights of an author in an unpublished work. The primary right recognized at common law is the right to *first publication* of the work.

Loew's Incorporated v. Superior Court, 18 Cal. 2d 419, 421, 423, 115 P. 2d 983, 984, 985 (1941);

Stanley v. Columbia Broadcasting System, 35 Cal. 2d 653, 661, 221 P. 2d 73, 77-78, 23 A. L. R. 2d 216, 225 (1950).

All other common law rights stem from that right.

Loew's Incorporated v. Superior Court, above, 18 Cal. 2d at p. 422, 115 P. 2d at pp. 984-985;

Stanley v. Columbia Broadcasting System, above.

So, for example, if an author makes a general publication of his work, he loses all his common law rights. Conversely, if he makes only limited publication of the work, he does not lose those rights. These common law rights can be abolished by an exclusive statutory scheme of protection, and such has happened in England.

Sec. 31 (Copyright Act, 1911) 1 and 2 Geo. 5, c. 46.

Unlike the contrary provisions of the English statute, these common law rights expressly were reserved to authors of unpublished works in our Federal copyright statute.

17 U. S. C. A., Sec. 2.

But the common law to be applied here is not the general common law but the common law of California.

And in California an author's common law rights have been codified by the legislature of that state, Civil Code, Sections 980, 983, and the legislature in the past has seen fit to amend the nature of those rights from time to time (see discussion under the publication section of this brief, below).

Therefore, it cannot be doubted that the California legislature, if it chose, could enact a specific statute of limitations to reach the result in the case at bar. It also follows that where a comprehensive scheme of statutes of limitation has been enacted, the same result may follow. This argument is strengthened by the fact that the Supreme Court of California has characterized the intellectual products of an author as *property*, entitled to the same protection as rights in any other species of property,

Loew's Incorporated v. Superior Court, above, 18 Cal. 2d at p. 421, 115 P. 2d at p. 984.

Hence, conversely, rights in this type of property must be subject to the same disabilities as rights in other types of property, for example, an appropriation thereof can be completely barred by a statute of limitations at some point in time—*Italiani* says in two years.

We have seen that at common law the author's primary right is that of first publication. And if he makes *one* general publication of his work, he dedicates the work to the public.

Grandma Moses Properties v. This Week Magazine, 117 Fed. Supp. 348, 350 (S. D. N. Y., 1953).

The rationale of the *Italiani* case appears to be based on the premise that since an author of an unpublished

work has as his primary right that of first publication thereof, that while an unauthorized first publication by another may not be such a publication as will dedicate the work generally to the public, nonetheless it is a publication and hence an appropriation of the work, *i. e.*, the taking amounts to literary theft and is immediately complete as between the author and the appropriator. Thus, despite the fact that the author may retain his rights to damages or an injunction, if he acts in time, against other members of the public who publish the work without permission, and despite the fact that the author still may himself be entitled to statutory copyright if he thereafter registers his work, his rights against this particular appropriator who published the work and those who claim under that appropriator may be barred by the statute of limitations; and they are so barred in California.

On page 23 and again at page 27 of Appellant's Opening Brief, the case of *Cain v. Universal Pictures Corp.*, 47 Fed. Supp. 1013 (S. D. Cal., 1942), is discussed. The *Cain* case involved an infringement of statutory copyright and has no application to the case at bar. There the work infringed by a motion picture was a copyrighted book and, of course, under the Federal copyright statute, as indicated above, every exhibition of a motion picture is a separate infringement. The *Italiani* case was brought into the *Cain* decision solely by reason of the fact that one Taylor, the scenario writer, made a motion to dismiss relying on the California two year statute of limi-

tations on the ground that he had made only *one* infringement, to wit, his copying of the book when he wrote the infringing scenario which infringing scenario he turned over to the motion picture company more than two years prior to the filing of the complaint. Judge Yankwich held that the action as to Taylor was not barred by the statute of limitations because his aim was to participate in subsequent statutory infringements by others.

Cain v. Universal Pictures Corp., above, 47 Fed. Supp. 1013, at p. 1018.

5. The Two-year Statute of Limitations Is a Bar to All the Remaining Purported Causes of Action.

The gist of an action for the taking of an author's common law intellectual property is the appropriation or theft of literary property. This is a tort, and since the author's primary common law right is the right to the first publication of that property, and since the taking is complete when the appropriator himself publishes the property, the result is that unless the author sues within two years, under California law any action against the appropriator is barred and the appropriator and those who claim under him are free to do with the property as they please.

We have seen that it is the substance of the action in California and not the particular form of the prayer for relief that determines the nature of the action. It also is immaterial in applying the statute of limitations whether this case is considered as an action at law or in equity. Whether an author seeks damages, or asks

for an accounting of profits, or for an injunction because of this appropriation, relates simply to the remedy, not to the nature of the action.

Certainly, if this plaintiff cannot maintain a direct action for damages for the *publication and use* of the song by defendants, it must follow that the bar of the statute of limitations cannot be circumvented by the addition of a count alleging unfair competition because of such publication and use.

Furthermore, this is not the normal case of unfair competition based solely on the use of a title, where there is no similarity between the contents of the works.

Jackson v. Universal International Pictures, 36 Cal. 2d 116, 120, 222 P. 2d 433, 435 (1950).

Instead, according to plaintiff, this is an appropriation of his entire song, musical composition and title alike. As to secondary meaning he alleges that the general public has "learned to identify plaintiff's *said song and the title* thereof with plaintiff" [R. 10] (Emphasis supplied). Hence his claim of secondary meaning encompasses the whole song, not just the title. Thus the appropriation must be considered indivisible, and because of the bar of the statute of limitations, defendants must be permitted to use both the body of the song and its title.

Moreover, as the sheet music of the defendants' song, as incorporated into the complaint, shows on its face [R. 24] the lettering of its title "THE SONG FROM MOULIN ROUGE" is more than twice the size of that

of the alternate title "WHERE IS YOUR HEART" which appears below it in parentheses. Accordingly, the public cannot be misled as to source.

Finally, since plaintiff claims it is his song which was appropriated by defendants, and since the title describes the song, defendants should be permitted to use it to describe the same song.

Gotham Music Service, Inc. v. Denton & Haskins Music Pub. Co., 259 N. Y. 86, 181 N. E. 57, 58 (1932);

Cf. Champion Spark Plug Co. v. Sanders, 331 U. S. 125, 67 S. Ct. 1136, 91 L. Ed. 1386 (1947) (Where no showing of palming off, sale of article reconditioned by another under original manufacturer's trade name allowed).

6. **If the Author Cannot Bring an Action Against the First Appropriator, It Follows That He Cannot Bring Any Action Against Others Who Claim Under That Appropriator.**

In this respect we simply advert briefly to the fact that the complaint shows on its face that the only song used by all the defendants is the very song first published in the motion picture on December 23, 1952 [R. 24. See references to the record in the statement of facts at page 4 above].

- B. A Professional Entertainer Who Since 1922 Has Sung and Performed His Song in Night Clubs, Music Halls, Theaters, Hotels and other Places of Amusement or Entertainment in the United States, England, France and Many Other Countries Throughout the World Before Hundreds of Thousands of Persons Constituting the General Public Has Published His Work Under California Law.

In the case at bar, plaintiff alleges:

“That plaintiff is an internationally known producer of musical acts and revues (including a well known musical sketch entitled ‘Moulin Rouge’) and plaintiff is himself a professional entertainer and composer residing in the County of Los Angeles, State of California” [R. 3].

“That during the year 1922, plaintiff originated, created and composed a unique, novel and original song and musical composition, with words and music, entitled ‘WHERE IS YOUR HEART’ . . .” [R. 5-6].

“That plaintiff has sung and performed his said song entitled ‘WHERE IS YOUR HEART’ in night clubs, music halls, theaters, hotels and other places of amusement and entertainment in the United States, England, France, and many other countries throughout the world . . .” [R. 6].

“That by reason of plaintiff’s widespread use, performance and singing of his said original song and musical composition entitled ‘Where Is Your Heart’ for more than thirty years last past, in hotels, night clubs, theatres and places of entertainment throughout the world, thousands of persons in the entertainment industry and hundreds of thousands of persons constituting the general public, have

learned to identify plaintiff's said song and the title thereof with plaintiff, and a secondary meaning has attached thereto by which the entertainment industry generally and the general public has for more than thirty years last past identified the song and musical composition entitled 'Where Is Your Heart' solely with the plaintiff herein" [R. 10].

It is the position of defendants that such performances of his song by a professional entertainer to hundreds of thousands of members of the public in places of entertainment over such a long period of time, namely approximately 33 years, amount to a general publication of the work and a dedication of it to the public.

Whether an author's common law rights in his intellectual work are lost by performance is a much debated question. See

Selvin, *Should Performance Dedicate*, 42 Cal. L. Rev. 40 (1954).

There is a division of authority in the cases, and California is aligned with the jurisdictions upholding the view that performance may dedicate, particularly where the performance is for profit.

Blanc v. Lantz, 27 Copyright Decisions 61, 83 U. S. P. Q. 137 (Superior Court Los Angeles County, 1949, not appealed).

Blanc v. Lantz was an action for alleged infringement of the musical laugh commonly referred to as the "Woody Woodpecker" laugh or song. The trial court sustained defendants' demurrer without leave to amend on the ground that under California law plaintiff had lost whatever rights he had at common law and under California statutes by reason of his public performance of the song

over the radio and the incorporation of it in the soundtrack of a motion picture. In his opinion in *Blanc v. Lantz*, Judge Stevens reasoned that

“ . . . to allow the proprietor to perform his work publicly without loss of the right, *no matter how wide-spread or commercially his performances may extend*, is to permit an exploitation of the idea by way of a perpetual monopoly inconsistent with the public good. Therefore ‘publication’ should be construed to be the same as ‘make public’, as used in Section 983 of the Civil Code, and the owner of an intellectual product who ‘intentionally makes it public,’ *whether by performance or by any other means*, should lose his right to exclusive performance unless he seeks the protection of federal copyright legislation and thereby acquires the limited right to exclusive performance which reflects the public policy of the people of this country through their elected representatives. To hold otherwise would enable the proprietor of the right to have the advantage of retaining a perpetual, though partial, monopoly in his product contrary to the whole policy of the copyright act and the Constitution” (27 Copyright Decisions, at p. 66; 83 U. S. P. Q., at pp. 139-140) (Emphasis supplied).

In reaching that decision he noted that

“ . . . although the editors of such works as *Corpus Juris Secundum* and *American Jurisprudence* state generally that the common law copyright is not lost by performance only, a division of authority exists on this question, and the Supreme Court of California appears to have left this question open in *Loew's Incorporated v. Superior Court*, 18 Cal. 2d 419 [50 U. S. P. Q. 641, 643]. In that case, the court stated, ‘The duration of the right, apart

from statute, of exclusive representation by the author of an unpublished dramatic work is not entirely clear. It has been said that it is not lost by public performance. *Ferris v. Frohman*, 223 U. S. 424, 32 Sup. Ct. 263, 56 L. Ed. 492; *Nutt v. National Institute, Inc.*, 31 F. 2d 236, 238. It has also been stated that by a public performance or a publication of the work with the author's consent, the author's common law right to exclusive performance is lost. *Palmer v. DeWitt*, 47 N. Y. 532, 542, 7 Am. Rep. 480; *Keene v. Wheatley*, 14 Fed. Cas. 180, 201, Case No. 7644. See, also, Civil Code, Sec. 983.' The citation of Civil Code, Section 983 following the statement that the common law right may be lost by public performance is some indication that the Supreme Court may have considered that this Section supports that rule." (27 Copyright Decisions at p. 65; 83 U. S. P. Q. at p. 139.)

Section 983 of the Civil Code to which the learned Judge referred was the section as it existed prior to the amendment in 1947. It then read as follows:

"§983. *Effect of publication.* If the owner of a product of the mind intentionally *makes it public*, a copy or reproduction may be made public by any person, without responsibility to the owner, so far as the law of this state is concerned." (Emphasis supplied.)

It now reads in pertinent part as follows:

"§983. [Effect of publication.] (a) If the owner of a composition in letters or art *publishes* it the same may be used in any manner by any person, without responsibility to the owner, insofar as the law of this State is concerned." (Emphasis supplied.)

The change in the statute as it then stood and as it now reads, so far as the question of publication is concerned, lies in the use of the words “makes it public” in the former and the word “publishes” in the latter. Mr. Selvin, at page 50 of his law review article above cited, comments upon the amendment in this language:

“In cases arising under section 983 as it stood down to 1947, there can be little doubt that a public, unrestricted performance or representation of an otherwise unpublished work, effected a dedication. Precisely to that effect is a well-considered opinion of Judge Stevens in *Blanc v. Lantz*, a reported decision of the Los Angeles Superior Court; and the intimations are strong in *Loew's Inc. v. Superior Court*, *Stanley v. Columbia Broadcasting System*, and the *Kurlan* and *Weitzenkorn* cases decided only a few months ago, that this would be the result. Certainly, the language of the statute leaves little room for argument to the contrary. In 1947, however, the section, along with others, was recast * * *. The effect of that change has yet to be determined. In a recent concurring opinion, Mr. Justice Traynor has indicated his view that the 1947 changes were designed only to make it clear that the property right in literary property depended on whether or not it had been published; not on whether the tangible embodiment of the work remained in the author's possession, and that it did not otherwise change the meaning of the sections. [Citing *Kurlan v. Columbia Broadcasting System*, 40 Cal. 2d 799, 875, 256 P. 2d 962, 973 (1953).] It may be, however, that the answer to our question will depend upon the meaning to be given the word ‘publish.’ Does it mean the same as ‘intentionally make public’ or was it designed to confine the situation to ‘publish’ in the narrow sense of ‘reproduction of copies?’ Cases in other

jurisdictions will lend support to either view, with I should say a substantial majority in favor of the view that in copyright law 'publish' means 'make public' or 'communicate to the public.' ”

In *Marx v. United States*, 96 F. 2d 204, 206 (9 Cir., 1938), this court held that a radio performance was a publication, saying:

“The word ‘publication’ has no definite and fixed meaning. ‘The word is legally very old, and of no one certain meaning. * * * The thought, however, running through all the uses of the word, is an advising of the public, a making known of something to them for a purpose.’ ”

Cf. White v. Kimmel, 193 F. 2d 744, 746-747 (9 Cir., 1952).

See also:

Egner v. E. C. Schirmer Music Co., 48 Fed. Supp. 187 (D. C. Mass., 1942), affirmed, *Id.*, 139 F. 2d 398 (1 Cir., 1943).

While the Court of Appeals in the *Egner* case did not discuss the point and affirmed the judgment below on other grounds, the District Court held that the widespread singing by soldiers and others of the composer's common law work “The Caisson Song,” which is familiarly known to us all as “The Caissons Go Rolling Along,” dedicated the work to the public. Judge Sweeney said:

“I find that the use of the song by Sousa and by the soldiers in the various cantonments was not such a limited publication as would save the rights of the composer.” (48 Fed. Supp. at p. 190.)

In other words, Judge Sweeney felt that in a case where an author's unpublished common law musical composition

had become known to the public through performance and where the public had taken up the song and popularized it, although without the composer's permission, such amounted to a dedication despite the traditional view that only a publication by the author could amount to a dedication.

In *RCA Mfg. Co., Inc. v. Whiteman*, 114 F. 2d 86 (2 Cir., 1940), *cert. denied*, 311 U. S. 712, 61 S. Ct. 393, 85 L. Ed. 463 (1940), Judge Learned Hand held that an author of an unpublished musical composition dedicated the work to the public when he *sold* records of the work—this despite the fact that each record contained a restriction on the label against a use of it for profit by the *buyer*. The contention there made was that the recording simply was a performance, was no more than a limited publication, and hence could not dedicate the work.

To the same effect see:

Shapiro, Bernstein & Co., Inc. v. Miracle Record Co., Inc., 91 Fed. Supp. 473, 475 (N. D. Ill., 1950),

where Judge Igoe stated:

“It seems to me that publication is a practical question . . .”

Thus far we have seen that in California at least one case, *Blanc v. Lantz*, has squarely held that public performance over the radio for his own gain by an author of an unpublished work, is a dedication. The opinion is extremely well reasoned and complete and reaches its conclusion only after a full consideration of policy reasons, which defendants in the case at bar assert apply with equal force to the instant case and compel a similiar

result. The court in the *Blanc* case found support for its position in an intimation in the opinion of Justice Shenk in *Loew's Incorporated v. Superior Court*, 18 Cal. 2d 419, 423, 115 P. 2d 983, 985 (1941), where the Justice cited Civil Code, Section 983, in conjunction with authorities stating that an author's common law right to exclusive performance is lost by a public performance.

Defendants' view that in California a public performance for profit is a dedication is buttressed by the language of the Supreme Court in *Stanley v. Columbia Broadcasting System*, 35 Cal. 2d 653, 666, 221 P. 2d 73, 80 (1950). There a writer recovered against a broadcasting company on an implied agreement to pay him for an uncopyrighted radio program originated by him, the form and idea of which later was used by the company. The writer's program had been auditioned on one occasion only before a "live" studio audience in the broadcasting company's studio and a recording of the program made. However, neither the program nor the recording was broadcast, nor was the writer paid. The court significantly said, in holding the publication a limited one:

"Defendant's contention that there can be no liability to pay for an idea which has been made public is without merit when *the facts of this case* are considered. When plaintiff made his audition recording before an audience in the National Broadcasting Company's studio he was not making his idea 'public property' within the meaning of the law. Prior to publication an author may make copies of his production and enjoy the benefit of limited or restricted publication without forfeiture of the right of a general publication. The communication of the contents of a work under restriction, known as a 'restricted

or limited' publication, is illustrated by performances of a dramatic or musical composition before a *select* audience. . . ." (Emphasis supplied.)

Under the facts of the case at bar, there was no "limited" publication before a "select" audience. Plaintiff admittedly has performed the song for profit over the years indiscriminately in night clubs, music halls, theatres, hotels and other places of amusement and entertainment in the United States and throughout the world, and "hundreds of thousands of persons constituting the general public" have learned to identify plaintiff's song [R. 10].

In this connection, it must be emphasized that there is no showing or claim of access in the traditional sense here, as contrasted, for example, with the situation in the *Stanley* case, above. Instead, defendant's knowledge of plaintiff's song merely is said to be the result of plaintiff's aforementioned widespread public performances [R. 6]. The cases cited by Justice Shenk in *Loew's Incorporated v. Superior Court*, above, for the proposition that public performance dedicates, indicate that an auditor of a public performance may reproduce it from memory and thereafter use it.

Keene v. Wheatley, 14 Fed. Cas. 180, 192, 201;
No. 7644 (C. C. E. D. Pa., 1861)

("A recitation or lecture before a select audience is private and before an indiscriminate audience, public." ". . . her own previous public performance of the play . . . was, on her part, an act of general publication.");

Palmer v. DeWitt, 47 N. Y. 532, 541-542, 7 Am. Rep. 480 (1872).

See also, the English view expressed in *Caird v. Sime*, 12 App. Cas. 326, 328 (1887) (university professor's lectures to students held no publication because students were selected, controlled audience and general public excluded. Lord Halsbury stating, however,

“ . . . where a person speaks a speech to which all the world is invited, either expressly or impliedly, to listen, or preaches a sermon in a church, the doors of which are thrown open to all mankind, the mode and manner of publication negative, as it appears to me, any limitation.”)

In summary, at one end of the performance spectrum we have the cases holding that performance is not a publication when the audience is carefully controlled, selected, or invited, the general public is excluded, and the profit motive is minimal or nonexistent.

Caird v. Sime, above (lecture);

Stanley v. Columbia Broadcasting Company (studio audience for audition).

In the middle we have the more difficult cases such as the play performances. Here the profit motive is present, and the courts strain to find some control of the audience because the latter must purchase tickets, the court sometimes finding in this fact an implied contract not to disclose or use what is heard. Typical of these cases are

Ferris v. Frohman, 223 U. S. 424, 32 S. Ct. 263, 56 L. Ed. 492 (1912);

Tompkins v. Halleck, 133 Mass. 32, 43 Am. Rep. 480 (1882).

It is submitted that *Keene v. Wheatley*, above, represents the view more consonant with public policy, and that it must be borne in mind that *Ferris* and *Tompkins* were

decided on facts occurring before the enactment of the Federal Copyright Act of 1909, which for the first time in this country, secured copyright for manuscripts not reproduced for sale.

At the other end of the performance spectrum we have such cases as *Blanc v. Lantz*, above (radio broadcast), and the *instant case* (performance indiscriminately in night clubs, music halls, theatres, hotels and other places of amusement and entertainment). A close analysis of the cases dealing with the problem of whether performance is a publication will demonstrate that there has never been a hard and fast rule that no performance can be a publication, the courts never having said more than that *under the facts of the particular case* performance was not a publication.

It is respectfully asserted, therefore, that under the law of California, both before and after 1947, a public performance of an unpublished dramatic or musical work for profit is a dedication, and in the language of the statute:

“ . . . the same may be used in any manner by any person, without responsibility to the owner, insofar as the law of this State is concerned.”

Certain it is that during the period 1922-1947, plaintiff already had dedicated his composition.

If ever there was a case where long continued public performance for profit throughout the world resulted in loss of “possession” and making “public” as those terms are used by the California statutes, the case at bar is such a case.

Conclusion.

This case really turns on what the basic policy underlying the so-called "perpetual" common law "copyright" shall be, as that policy is interpreted by the California Courts. That policy is to adhere strictly to the mandate found in the United States Constitution, Article 1, Section 8, granting Congress the power "To promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Thus where an author does not choose to avail himself of the Federal Copyright Act, which includes among its provisions one for copyright of an unpublished work of which copies are not reproduced for sale (17 U. S. C. A., Sec. 11), he must act in time—in California, within two years—if another appropriates his work, or his action for such taking is forever barred.

We conclude by appropriating the language of Judge Stephens in *Blanc v. Lantz*, above. Here then we are confronted with a situation where, for the purpose of this motion, the plaintiff had created a musical composition which he could have copyrighted under federal law and thereby have secured a limited monopoly to the exclusive performance of his intellectual product. By failure so to protect his work, yet by electing to exploit it commercially by personal performance, plaintiff has lost his right to the exclusive property in the song. Since defendants' asserted acts of plagiarism occurred subsequent to the acts

by which plaintiff “published” his creation, they are under no liability to plaintiff for its use. (See 27 Copyright Decisions, pp. 71-72; 83 U. S. P. Q. at p. 142.)

The judgment should be affirmed.

Respectfully submitted,

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No. 15188

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FOR THE NINTH CIRCUIT

LEO MANTIN,

Appellant,

vs.

BROADCAST MUSIC, INC., a corporation, *et al.*,

Appellees.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

Preliminary Statement.

The District Court Judge granted the motion to dismiss *solely* on the basis of the statute of limitations, California Code of Civil Procedure, Section 339.1 [R. 48-51]. For this reason, Appellant's Opening Brief concerned itself solely with the statute of limitations problems of the case.

Appellee's Answering Brief fails to answer, or even discuss, most of the fundamental limitation arguments advanced by appellant. These unanswered arguments, and the authorities cited in support, require reversal and a trial on the merits.

Instead of dealing with the limitations problems—the fundamental problems on this appeal—appellees devote approximately one-half of their argument to the assertion that appellant has “published” his musical composition. This assertion is without any merit whatever. It was rejected by the court below [R. 49-50] on the basis of overwhelming authority, which will be discussed at Point IV, *infra*.

I.

None of Plaintiff's Claims for Damages for Infringements Occurring Within Two Years Prior to the Commencement of This Lawsuit Is Barred by the Statute of Limitations.

- A. Defendants Ignore the Well Settled California Rule That Successive, Repeated or Continuous Torts Each Create New or Separate Causes of Action, so That Each Exhibition of Defendants' Motion Picture and Each Sale of Sheet Music or Phonograph Records, as Well as Each Radio Broadcast Constitutes a Fresh Infringement.

The facts relating to the new and different infringements committed by each of the defendants are fully stated in appellant's opening brief (pp. 6-9, 14-16). The complaint clearly alleges that all of the infringements were continuous from the time of commencement to the date the complaint was amended on April 18, 1955 [R. 17-19]. None of the defendants except Romulus and United Artists Corporation committed *any* infringing act prior to February 1, 1953 (within two years prior to the commencement of the action). The defendants Romulus and United Artists Corporation exhibited the infringing motion picture a few times prior to the commencement of the two-year period, but have continuously and successively exhibited the motion picture since that date in California and elsewhere throughout the world.

Plaintiff's fundamental contention as to these two defendants is that their tort was continuing and repeated in nature. The essential damaging acts were the continued and repeated exhibitions of the motion pictures containing innumerable unauthorized performances of plaintiff's original composition. Damage by unauthorized public exhibition or performance is an integral element of the tort. (*Golding v. R. K. O. Pictures*, 35 Cal. 690, 696, 221 P. 2d 95, 97 (1950); *Cain v. Universal Pictures*

Co., 47 Fed. Supp. 1013, 1017-1018 (D. C. Cal., 1942); 34 Am. Jur. 416-417.)

Under well-settled California law, "Where the tort is continuing, the right of action is also continuing," and is not barred by the statute of limitations. (*Trombley v. Kolts*, 29 Cal. App. 2d 699, 708, 85 P. 2d 541, 545 (1938).) A tort which "may be discontinued at any time . . . is . . . continuing in character" and each repetition constitutes ground for a separate action. (*Phillips v. City of Pasadena*, 27 Cal. 2d 104, 107-108, 162 P. 2d 625, 626-627 (1945).)

In the case of repeated or continuously damaging acts, the statute begins to run anew upon the commission of each successive damaging act. (*Phillips v. City of Pasadena*, *supra*; *Kafka v. Bozio*, 191 Cal. 746, 218 Pac. 753 (1923); *Landberg v. Linder*, 133 Cal. App. 213, 218 (1933); *Cf. Kornoff v. Kingsbury Cotton Oil Co.*, 45 Cal. 2d 265, 268-271, 288 P. 2d 507 (1955); 34 Am. Jur. 127.)

Furthermore, as stated in *Carbine v. Meyer*, 126 Cal. App. 2d 386, 390, 272 P. 2d 849, 853 (1954):

"In all cases of doubt respecting the permanency of the injury, the court are inclined to favor the right to successive actions. (*Kafka v. Bozio*, *supra*, p. 753.)"

These well-established rules—rules that conclude the present appeal against defendants—are not even mentioned by defendants in their brief. There is no attempt by the defendants to distinguish or even discuss the cases upon which the rule is based.

Instead, defendants rely exclusively upon *Italiani v. Metro-Goldwyn-Mayer Corporation*, 45 Cal. App. 2d 464, 114 P. 2d 370 (1941), which we have fully discussed in our opening brief, pages 18-19. Space limitations preclude restatement of that argument. The simple fact

remains that neither counsel nor the court, in the *Italiani* case, gave any consideration whatever to the problem of continuous or repeated infringement either by the same defendant or by *different* defendants in *different* media of communications, *e.g.*, radio, phonograph records, sheet music, sales, etc.

B. Defendants Ignore the Well-settled Rule That the Author or Composer Owns a "Bundle" of Common Law Rights, the Invasion of Any One Giving Rise to a New and Separate Cause of Action as to Each New Defendant-Invader.

Appellees argue that the distinction between common law copyright and statutory copyright is such that as soon as an infringer violates a composer's common law right, the composer's work is "made public," and unless the composer seeks redress based on that first infringement within two years, he loses all of his rights against the infringer "and those who claim under him" (Appellees' Ans. Br. pp. 15-19).²

This argument is based on the premise that the "primary right recognized at common law is the right to first publication of the work" and that "all other common law rights stem from that right" (*Id.*, p. 16). Defendants argue from this premise that if the first "publication" is a wilful infringement (of course, not authorized or con-

²Defendants' contention impliedly concedes that unless the other defendants "claim under" the first infringers, the plaintiff may maintain his action.

There is nothing in the record to sustain appellees' suggestion that the other defendants "claim under" either of the defendants Romulus or United Artists Corporation.

Furthermore, defendants expressly *admit* that notwithstanding the first literary theft "by the first appropriator", "*the author may retain his rights to damages or an injunction if he acts in time against other members of the public who publish the work without permission*" (Appellees' Ans. Br. p. 18).

sented to by the composer) and goes unredressed for two years, all other rights are lost, despite the fact that the infringement is continuous and repeated. Defendants try to make the *Italiani* case, 45 Cal. App. 2d 464, 114 P. 2d 370 (1941), stand for their contention (Appellees' Ans. Br. pp. 17-18).

The fallacious argument never appeared in the *Italiani* case. As presented by the briefs, the Court in *Italiani* was simply called upon to decide whether the two or three year statute applied; the plaintiff's theory being one of simple "conversion" of his property. No one briefed any other point. The Court decided no other point.

Furthermore, appellant's entire argument is incorrect: Common law rights in literary or musical property do not consist primarily of the single right of first publication. The property which an author has in his intellectual productions consists, as in the case of ownership of any property, of a "bundle of rights" which include, among others, the following:

1. The sole right to retain the property in manuscript form perpetually (18 C. J. S. 140; 13 C. J. S. 951).
2. The exclusive right "to possess, use and dispose of [the] intellectual production" (18 C. J. S. 139).
3. The right to prevent use or disposition by others (18 C. J. S. 140).
4. The right to circulate the manuscript in a limited manner, restricting use "as he pleases." (18 C. J. S. 140; 13 C. J. 949; Ball, *The Law of Copyright and Literary Property*, 57; Amdur, *Copyright Law and Practice*, 38.)
5. The right to print without publication. (Ball, *loc. cit.*)
6. The right to copy. (Ball, *loc. cit.*)
7. The right to translate. (Ball, *loc. cit.*)
8. The right to dramatize. (Ball, *loc. cit.*)
9. The right to abridge or revise. (Ball, *loc. cit.*)

10. The right of first publication. (Ball, *loc. cit.*; 18 C. J. S. 140; Amdur, *op cit.*, p. 37.)

11. The right to assign and transfer the manuscript and the literary property rights, together or independently of one another. (18 C. J. S. 140; Ball, *loc. cit.*; Amdur, *op. cit.*, p. 39.)

12. As to musical and dramatic productions, the right of the author to perform publicly, without any loss of rights. (13 C. J. 968; 18 C. J. S. 141-142, 154; Shafter, *Musical Copyright*, 130, 131 (1939); *Golding v. RKO Pictures, Inc.*, 35 Cal. 2d 690, 693, 221 P. 2d 95, 96 (1950); *Ferris v. Frohman*, 223 U. S. 424, 435-436, 31 S. Ct. 263, 266, 56 L. Ed. 492, 497 (1912); *McCarthy & Fisher, Inc. v. White*, 259 Fed. 364, 365 (D. C. N. Y., 1919).)

This bundle of rights is perpetual in nature, and has often been described as being “of a wider and more exclusive nature than the rights conferred by statutory copyright. . . .” (*Stanley v. Columbia Broadcasting System*, 35 Cal. 2d 653, 661, 221 P. 2d 73, 78 (1950) (emphasis in original); *Yadkoe v. Fields*, 66 Cal. App. 2d 150, 160, 151 P. 2d 906, 911 (1944).)

It is a tort to invade any of these sole and exclusive rights, to the plaintiff's damage. (18 C. J. S. 158; *Stanley v. Columbia Broadcasting System*, 35 Cal. 2d 653, 661, 221 P. 2d 73 (1950).)

It is impossible to define the right of first publication as “primary,” or the source “of all other common law rights” as appellees seeks to do (Appellees' Ans. Br. p. 16). *The authorities cited by appellees stand for no such proposition, and we know of no such authority.*

The “right of first publication” is not the great source of all other rights. On the contrary, it is the act by which those rights may be lost. Infringement of that right, like infringement of any other common law rights, gives rise to a cause of action. If the cause of action

for the first infringement becomes barred by the statute of limitations, remedy for that infringement alone is lost; or in the case of continued and repeated infringements, the right to seek damages beyond the statutory period is lost. Nothing more.

To completely bar all of plaintiff's rights and remedies against all subsequent infringers two years after the date of first infringement, is to interpret the California Statute of Limitations as equivalent to an adverse possession statute, which it certainly is not. Even appellees do not make such an assertion before this Court.

Nor do appellees improve their position by describing themselves as persons who have committed "theft" (Appellees' Ans. Br. p. 18). By characterizing their acts as "theft" and by describing the thing stolen as "the primary right," they change nothing. They still cannot establish their proposition that the infringement is "immediately complete," and all of plaintiff's rights and remedies against future infringements *forfeited* if he does not seek redress for the first infringing act (Appellees' Ans. Br. p. 18).

The California law of repeated and continuous damaging acts heretofore referred to in this brief, which has been applied in a variety of comparable tort situations, is equally applicable here. The damage is not "immediately complete" in cases where the damaging act may be discontinued by the defendants.

Moreover, the law is well-settled that each separate invasion of rights in literary or musical property gives rise to a separate cause of action. The authorities on this point are set forth in our opening brief, pages 24-25, 28. Defendants do not even discuss them, merely claiming the rule of separate infringement is applicable to statutory copyright but not to separate and successive infringements of common law rights. They cite no authority for this distinction and *ignore* the authorities quoted in our opening brief directly to the contrary. (See Appellant's Op. Br. p. 35.)

C. None of Plaintiff's Claims Against Defendant Music Publisher (BMI), Defendant Record Companies, and Defendant Broadcasting Companies Are Barred by the Statute of Limitations.

Retreating from the position primarily asserted in the District Court where these defendants claimed, in effect, that California Code of Civil Procedure, Section 339.1, operated as an adverse position statute against literary property, these defendants now assert that their rights are "derivative" and that they are in the position of "claiming under" defendants Romulus and United Artists (Appellees' Op. Br. pp. 18, 21).

This argument is quickly refuted. There is not one allegation in the pleadings, or one fact in the record, which places these defendants in that position. The simple fact is that none of these defendants commenced an infringement until February 1, 1953—within the limitation period. These defendants seek to absolve themselves from all liability by arguing that the same infringing song was used by each of the defendants. It is impossible for them to proceed from this point to establish that they are "derivative" infringers, even if such a category could exist. These defendants could have been licensed by the infringing "composer," or they could have infringed without putative rights of any sort.

Moreover, if the record is inspected, it will be found that it is defendant BMI, *not* Romulus *nor* United Artists, which took out the purported federal "copyright" on the infringing composition [R. 42-43]. Yet, BMI comes before this Court claiming its "rights" are "derivative" from the "rights" of the "first appropriator."

There is no factual basis to support this claim of "derivative" putative rights. Moreover, plaintiff is entitled to the benefit of "the most favorable inferences" which can be drawn from the record. (*Sidebotham v. Robison*, 216 F. 2d 816, 831 (9th Cir., 1955).)

Plaintiff is further entitled to have the case reviewed "in the aspect most favorable to the plaintiff and most unfavorable to the defendant." (*Woods v. Hillcrest Terrace Corporation*, 170 F. 2d 980, 984 (8th Cir., 1948).)

Furthermore, it is well-established California law that a plaintiff may not be denied his day in Court if the demurrer based on a statute of limitation "merely shows that the action *may* have been barred. It must affirmatively appear that, upon the facts stated, the right of action is necessarily barred." (*Vassere v. Joerger*, 10 Cal. 2d 689, 693, 76 P. 2d 656, 658 (1938); *Miller v. Brown*, 107 Cal. App. 2d 304, 307, 237 P. 2d 320 (1951); *Pike v. Zadig*, 171 Cal. 273, 152 Pac. 923.)

Such is not the case here. In any event, it makes no difference whether these defendants copied directly from plaintiff or from those who copied from plaintiff. (*Wihtol v. Wells*, 231 F. 2d 550, 553 (7th Cir., 1956).)

Furthermore, *as a matter of law*, the so-called "derivative" infringements are equally culpable separate infringements, giving rise to separate causes of action. (*Encore Music Publications v. London Film Productions*, 89 U. S. P. Q. 501, 28 Copyright Bulletin 144 (D. C., N. Y., 1951); *Northern Music Corp. v. King Record Distributing Co.*, 105 Fed. Supp. 393, 400-402 (D. C. N. Y., 1952).)

The facts in the record speak for themselves as to these defendants. *Not one of them committed a single infringing act before February 1, 1956*—a date which does not fall within the bar of the limitation statute. (The facts are set forth in detail at p. 38 of our opening brief.) Therefore, no cause of action could possibly have accrued to plaintiff against these defendants until *after* that date.

It is uncontestably the law of California that no statute of limitation can begin to run until a cause of action accrues to the plaintiff. (Cal. Code Civ. Proc., Sec. 312; *Irvine v. Bassar*, 25 Cal. 2d 652, 658, 155 P. 2d 9, 13 (1944); *Lubin v. Lubin*, 144 A. C. A. 898, 906 (1956); 16 Cal. Jur. 488-490.)

Plaintiff is, therefore, entitled to his day in Court against these defendants. The judgment of dismissal should be reversed as to plaintiff's first cause of action.

II.

Plaintiff's Claims of Unfair Competition Against All Defendants, Contained in His Second Count, Are Not Barred by the Statute of Limitations.

The record reveals that public confusion and deception, began during the year 1953 as to plaintiff's composition [R. 10]. There is nothing in the record which indicates the date of commencement of public deception and confusion as *prior* to January 19, 1953. It is not so alleged by plaintiff, and defendants have not moved under Federal Rules of Civil Procedure, Rule 12b, to show that they committed no act of deception or confusion within the statutory period. Plaintiff's complaint expressly alleged that public deception *began on February 1, 1953*, as to plaintiff's title [R. 11]. There is no basis, therefore, for an argument that plaintiff is barred by a two-year statute of limitation with respect to his causes of action for unfair competition.

Plaintiff is entitled to have all inferences resolved in his favor. (*Sidebotham v. Robison*, 216 F. 2d 816, 831 (9th Cir., 1955); *Woods v. Hillcrest Terrace Corporation*, 170 F. 2d 980, 984 (8th Cir., 1948).) The cause of action certainly is not "necessarily" barred, as it must be before plaintiff can be denied his day in Court. (*Vassere v. Joerger*, 10 Cal. 2d 689, 693, 76 P. 2d 656, 658 (1938); *Miller v. Brown*, 107 Cal. App. 2d 304, 307, 237 P. 2d 320; *Pike v. Zadig*, 170 Cal. 273, 152 Pac. 923.)

Furthermore, in any event, the tort is continual and repeated and, therefore, even if it were commenced before the limitation period, the only bar would be as to damages accrued prior to January 19, 1953. (4 Callmann, Unfair Competition and Trademarks, 1784, n. 2 (1950); *cf. Curtis v. Twentieth Century-Fox Film Corp.*,

140 Cal. App. 2d 461, 464-465, 295 P. 2d 62, 64 (1956); *Trombley v. Kolts*, 29 Cal. App. 2d 699, 708, 85 P. 2d 541, 545 (1938); *Phillips v. City of Pasadena*, 27 Cal. 2d 104, 107-108, 162 P. 2d 625, 626-627 (1945); *Kafka v. Bozio*, 191 Cal. 746, 218 Pac. 753 (1923); *Carbine v. Meyer*, 126 Cal. App. 2d 386, 390, 272 P. 2d 849, 853 (1954); 34 Am. Jur. 127.)

Defendants make no answer which has any support in authority. They argue that plaintiff can sue for unfair competition only if he can also sue for invasion of his common law rights (Appellees' Ans. Br. pp. 19-21). It has been authoritatively held that allegations of public confusion, deception and unfair competition differentiate the case completely from a case of simple invasion of common law rights in intellectual property. The tort is not complete until the element of public or industry confusion and deception is present. (*Leo Feist, Inc. v. Song Parodies*, 146 F. 2d 400 (2nd Cir., 1944); *Collins v. Metro-Goldwyn Pictures Corporation*, 106 F. 2d 83, 85 (2nd Cir., 1939), approved in *Reeves v. Bandall*, 316 U. S. 283, 284, 62 S. Ct. 1085, 1087, 86 L. Ed. 1478, 1479 (1942), and *Sears, Roebuck & Co. v. Mackey*, 351 U. S. 427, 438, 76 S. Ct. 895, 901, 100 L. Ed. 1297 (1956); see also *Curtis v. Twentieth Century-Fox Film Corp.*, 140 Cal. App. 2d 461, 464, 465, 295 Pac. 62, 64 (1956).)

Defendants have made no attempt to distinguish or discuss plaintiff's authorities cited in our opening brief, pages 42-46. We reaffirm our contention that the tort of unfair competition differs from the tort of invasion of common law rights in musical property and contains different elements. The essential distinguishing element—confusion and deception of the public and the industry—arose within the two-year period.

Plaintiff is, therefore, entitled to reversal as to the second count.

III.

Plaintiff's Claims for Injunctive Relief and an Accounting Against All Defendants, Contained in His Third Count, Are Not Barred by the Statute of Limitations.

Appellees make practically no argument to support their assertion that plaintiff's equitable rights to an injunction and an accounting are barred by Code of Civil Procedure, Section 339.1, the sole statute upon which they rely [R. 15].

They ignore the long line of authority which holds that a suit for equitable relief is subject only to the four-year statute, California Code of Civil Procedure, Section 343. (*Pillar v. Southern Pacific R.R. Co.*, 52 Cal. 42, 44 (1877); *Dore v. Thornburgh*, 90 Cal. 64, 27 Pac. 30 (1891); *Freeman v. Donohoe*, 65 Cal. App. 65, 223 Pac. 431 (1923).) They do not mention *Lux v. Haggin*, 69 Cal. 255, 4 Pac. 919 (1886), which specifically held that the four-year statute applied to suits for injunction.

Appellees ignore the authorities decided under the comparable New York statute set forth in our opening brief, pages 49-51, which hold that suits in equity are amenable only to the New York equivalent of the California four-year, "catch-all" statute.

Appellees ignore the repeated California holdings that an action or suit for an accounting, whether it be considered equitable or legal, is subject only to the California four-year statute, Code of Civil Procedure, Section 343. (The cases are cited in our opening brief, pp. 52-54.)

Instead, appellees rely on dicta in a case which was decided contrary to them: *Maguire v. Hibernia Savings & Loan Soc.*, 23 Cal. 2d 719, 733, 146 P. 2d 673, 680 (1944), where the Court held that declaratory relief suits were subject to the statute of limitations. The Court, stating that the nature of the right asserted governed the

applicability of the statutes, held that a declaratory relief suit was not barred until the action or suit for "coercive" relief was barred, although the declaratory relief suit could be brought before coercive relief was available. (The Court did not determine which statute applied to the case before it.) The Court further held, under this rule, that although the controversy had developed approximately eighty years before (1864), the action was not barred.

The *Maguire* case in no way impugns plaintiff's position that where a separate count seeks the equitable relief of injunction and accounting, that count is subject only to the four-year statute. Plaintiff does not seek a declaratory judgment in the instant case. He seeks, in a separate count, an injunction and an accounting—remedies with which the *Maguire* case was not concerned. A wealth of authority, heretofore cited in our opening brief, pages 46-54, supports plaintiff's contention that his right to such relief, based on the nature of his right to such relief, is not barred. Four years had not elapsed.

Furthermore, in the case of a continued and repeated invasion of rights, the right to equitable relief is, of course, no more barred than the right to relief at law by time elapsing from the date of the first infringement. (*Vownickel v. N. Clark & Sons*, 216 Cal. 156, 164-165, 13 P. 2d 733 (1932) (repeated invasions over forty years, *held*, suit for injunction not barred).)

Plaintiff is, therefore, entitled to a trial on the merits of his claim for equitable relief.

IV.

Plaintiff Has Not, by Performing His Song, Made It Public Property.

Appellees argue that plaintiff, by singing his song in theaters, night clubs and other places of entertainment and amusement throughout the world for more than thirty years, has lost all of his common law rights (Appellees' Ans. Br. pp. 22-32). This argument, which is unsupported by authority, was rejected by the Court below [R. 49-50].

The allegations in the complaint are clearly contrary to any claim of publication, abandonment or dedication.

1. The "song and musical composition have never at any time been published in any form by plaintiff or with plaintiff's knowledge, authority and consent" [R. 6].

2. The composition has "at all times remained in manuscript form" [R. 6].

3. The plaintiff has "at all times owned and retained and does now own and retain all common law rights" [R. 6].

Appellees seek to avoid the effect of these allegations and the authoritative cases which hold that performance of a song or play does not dedicate it. They place great reliance on a law review article by Herman Selvin, a Los Angeles attorney. (Selvin, *Should Performance Dedicate?*, 42 Cal. L. Rev. 40 (1954).) Appellees have followed, to a large degree, his reasoning and have relied upon the cases he cites. But Selvin *freely admits the present, well-settled state of the law*:

" . . . in the United States at least, the rule now seems to be that performance or representation of an unpublished work, even though general, indiscriminate and unrestricted, is not a dedication of the perpetual common law right" (Selvin, *op. cit.*, p. 44).

Few propositions are as well-established in the law of literary and musical property as the one on which plaintiff now relies, and upon which he has relied for more than thirty years: *Performance of a musical or dramatic composition does not dedicate it to the public.*

Ferris v. Frohman, 223 U. S. 424, 435-436, 31 S. Ct. 263, 266, 56 L. Ed. 492, 497 (1912):

“At common law, the public performance of the play is not an abandonment of it to the public use. *Macklin v. Richardson*, 2 Ambl. 694, 7 Eng. Rul. Cas. 66; *Morris v. Kelly*, 1 Jac. & W. 481, 21 Revised Rep. 216; *Boucicault v. Fox*, 5 Blatchf. 87, 97, Fed. Cas. No. 3,441; *Palmer v. DeWitt*, 2 Sweeny 530, 47 N. Y. 532, 7 Am. Rep. 480; *Tompkins v. Halleck*, 133 Mass. 32, 43 Am. Rep. 480. Story states the rule as follows: ‘So, where a dramatic performance has been allowed by the author to be acted at a theater, no person has a right to pirate such performance, and to publish copies of it surreptitiously; or to act it at another theater without the consent of the author or proprietor; for his permission to act it at a public theater does not amount to an abandonment of his title to it, or to a dedication of it to the public at large.’ 2 Story, Eq. Jur., §950.”

Shafter, *Musical Copyright*, 131 (1939):

“Performance is one of those acts which do not result in loss of rights. Performance of a musical or dramatic work is not tantamount to publication—a rule observed throughout the world.”

(*Uproar Co. v. National Broadcasting Co.*, 8 Fed. Supp. 358, 362 (D. Mass., 1934), mod. on other grounds, 81 F. 2d 373 (1st Cir., 1936); *Patterson v. Century Productions, Inc.*, 93 F. 2d 486, 492 (2d Cir., 1937); *Crowe v. Aiken*, 6 Fed. Cas. 905, No. 3,441 (C. C., N. D. Ill., 1870); *Boucicault v. Hart*, 3 Fed. Cas. 983, No. 1692

(C. C., S. D. N. Y., 1875); *Roberts v. Myers*, 20 Fed. Cas. 898, No. 11906 (C. C., D. Mass., 1868); *Tompkins v. Halleck*, 133 Mass. 32 (1882); 34 Am. Jur. 446-447; 18 C. J. S. 154-155; see also: *McCarthy & Fischer v. White*, 259 Fed. 364, 365 (S. D. N. Y., 1919); *Nutt v. National Institute Incorporated for the Improvement of Memory*, 31 F. 2d 236, 238 (2d Cir., 1926.).

The California rule is, and always has been, the same. The arguments made by appellees, based on the Selvin article and *Blanc v. Lantz*, 83 U. S. P. Q. 13, 27 Copyright Decisions 61 (L. A. Super. Ct., 1949), overlook and ignore the rulings of the California Supreme Court in *Golding v. R. K. O. Pictures, Inc.*, 35 Cal. 2d 690, 221 P. 2d 95 (1950), and *Stanley v. Columbia Broadcasting System*, 35 Cal. 2d 653, 221 P. 2d 73 (1950).

While appellees urge that dedication took place on the basis of the California statutes (Civ. Code, Secs. 980, 983), as they stood prior to the 1947 amendment, the *Golding* and *Stanley* cases were both decided on the basis of the statutes prior to amendment. In the *Golding* case, the plaintiffs had publicly produced their play for several weeks at the Pasadena Playhouse during December, 1942. In an action for infringement of common law rights in literary property, the California Supreme Court, at the very beginning of its opinion, holds that plaintiffs had by such public performances "neither published (their work) nor dedicated it to the public" (35 Cal. at 693).

Likewise, *Stanley v. Columbia Broadcasting System*, 35 Cal. 2d 653, 221 P. 2d 73 (1950) (which appellees claim "buttresses" their argument), in fact holds *directly contrary* to defendants' contention that public performance in California *prior* to 1947 was sufficient "making public" to dedicate or abandon all common law rights. The California Supreme Court there held that *free* performance of a radio program before a studio audience of several hundred persons was *not* a general publication

or dedication. While the Court cast its opinion in the language of limited publication, the case was argued³ and decided on the same principles and cases now presented to this Court by appellant. The California Supreme Court, in rejecting defendants' contention that there had been a publication, relied on the very authorities now relied on by appellant, 35 Cal. 2d 653, 666, 221 P. 2d 73 (see cases cited *supra*, pp. 15-16). They are authorities which hold that performance of a musical or dramatic composition does not dedicate.

There is no basis for appellees' claim that plaintiff's audiences were any less "select" than theatrical audiences anywhere. Nor is there any basis for appellees' distinction with respect to the number of persons who are alleged to have heard the plaintiff sing his song. The greater the composer's success (*e.g.*, "Oklahoma," "South Pacific"), the more the need for his protection. The same rule of law applies whether the number of performances is one or a thousand.

Moreover, even if the type of audience is important, as appellees argue, there is no basis for distinguishing the instant case from either *Stanley* or *Golding*. The studio audience in the *Stanley* case paid *no admission fee*, whereas, the Court can take judicial notice, as Justice Holmes once did in a comparable case, that audiences in theaters and night clubs pay a substantial amount for the limited purpose of hearing and seeing the performances—not reproducing them. (*Cf. Herbert v. Shanley Co.*, 242 U. S. 591, 594-595, 61 L. Ed. 511, 512 (1917).)

Furthermore, any change even if made in 1947 inures to the benefit of the plaintiff herein. Section 983, California Civil Code, formerly used the phrase "makes it public" to describe the act necessary for dedication. When

³See, *Stanley v. Columbia Broadcasting System*, Appellant's Opening Brief, pp. 70-75; Brief for Respondent, pp. 52-63.

the code was changed in 1947, the phrase "makes it public" was deleted and the common law word "publish" was inserted. Therefore, if the change in the statutory language is to be given any effect (see *Stamper v. Schemmel*, 69 Cal. App. 2d 449, 454 (1945)), it must be interpreted as reinforcing the rule that California follows the common law principles well established and widely recognized in this country, as the cases heretofore cited make clear. (See also: *Johnston v. Twentieth Century-Fox Film Corp.*, 82 Cal. App. 2d 796, 187 P. 2d 474 (1947).)

Appellees rely principally upon a *nisi prius* decision of the Superior Court in Los Angeles County, *Blanc v. Lantz*, 830 U. S. P. Q. 13, 27 Copyright Decisions 61 (L. A. Super. Ct., 1949). In that case, "Woody Woodpecker's laugh" ("Ha-Ha, Ha-Ha, Ha-Ha") was prior to defendants' alleged infringement, broadcast over the radio and reproduced in motion pictures *with plaintiff's consent*. The motion pictures were placed in general public release and distribution. The Court held that this constituted a general publication with resultant loss to plaintiff of all his rights. There are no such facts in the instant case.

Furthermore, the *rationale* of the case (aside from the "publication" in motion pictures) has been universally condemned. One distinguished commentator in referring to the argument of the Superior Court judge (which has been adopted by appellees) stated:

"This argument repudiates 300 years of legal history . . . The *Mel Blanc* case constitutes an anomaly in the field of common law copyright and its holding that a performance is a general publication should be reversed on appeal." (Warner, Radio and Television Rights, 877, 880 (1953).)

Unfortunately, the decision was not appealed. It remains an anomaly frozen in the archives of the Los Angeles County Superior Court, not binding on this Court

(*King v. United Commercial Travellers*, 333 U. S. 351, 68 S. Ct. 488, 92 L. Ed. 608 (1948), reh. den. 333 U. S. 878, 68 S. Ct. 900, 92 L. Ed. 1153 (1948)), repudiated by the *Golding* and *Stanley* cases, *supra*, decided by the California Supreme Court less than a year later, and completely distinguishable from the instant case. Here the plaintiff only sang his song; he did not broadcast it by radio, sell and distribute it in a motion picture, nor produce and sell it on phonograph records. Plaintiff performed his song in the most ancient manner known to civilization—he sang it. There is no basis for equating bare performances with a general publication by printing sale or public distribution.

The other cases cited by appellees, such as *Loew's Incorporated v. Superior Court*, 18 Cal. 2d 419, 1151 P. 2d 983 (1941); *Marx v. United States*, 96 F. 2d 204, 206 (9th Cir., 1938); *White v. Kimmel*, 193 F. 2d 744, 746 (9th Cir., 1952); *Egner v. E. C. Schirmer Music Co.*, 48 Fed. Supp. 187 (D. C. Mass., 1942), affirmed on other grounds 139 F. 2d 398 (1st Cir., 1943); and *RCA Mfg. Co., Inc. v. Whiteman*, 114 F. 2d 86 (2d Cir., 1940), are not in point. They are clearly distinguished in the appendix to this brief. Space limitation precludes their discussion here.

These are the authorities primarily relied on by defendants. The few remaining cases cited by defendants are either clearly distinguishable or clearly opposed by other more recent authorities in the same jurisdiction (*e.g.*, *Keene v. Wheatley*, 14 Fed. Cas. 180, 192, 201, No. 7644 (C. C. E. D. Pa., 1861), is opposed by the Supreme Court holding in *Ferris v. Frohman*, 223 U. S. 424, 32 S. Ct. 263, 56 L. Ed. 492 (1912).)

While appellees seek to rationalize isolated decided cases into a "performance spectrum" (Appellees' Ans. Br. p. 31), the truth is that no authoritative case holds expressly, or by implication, that the simple performance by the

author of his work can constitute a dedication. Conclusive authorities, from the United States Supreme Court in *Ferris v. Frohman, supra*, to the California Supreme Court in *Golding v. R.K.O. Pictures, Inc., supra*, and *Stanley v. Columbia Broadcasting System, supra*, all hold that such performance does not and never did dedicate the author's rights.

This principle has long been accepted by the public and throughout the vast machinery of the entertainment industry. A decision in accordance with appellees' contentions would destroy property whose value reaches into millions of dollars. A decision in accordance with appellees' contentions would also overturn, by judicial fiat, the mandate of Congress in Section 2 of the Copyright Act, 17 U. S. C. 2, 61 Stats. 652 (1947) and the settled law of the land.

There was no abandonment, dedication or publication by appellant, and the lower court expressly so held [R. 49-50].

Conclusion.

The judgment should be reversed.

Respectfully submitted,

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APPENDIX.

Appellees' Additional Cases Distinguished.

In addition to *Blanc v. Lantz*, 830 U. S. P. Q. 13, 27 Copyright Decisions 61 (L. A. Super. Ct., 1949), appellees cite the following cases which are clearly distinguishable:

Appellees first refer to a dictum in the case of *Loew's Incorporated v. Superior Court*, 18 Cal. 2d 419, 1151 P. 2d 983 (1941), where the Court noted that differing statements have been made on the effect of performance. The Court's dictum must be placed in context. The decision holds that the author may elect between common law and statutory rights, but after seeking federal copyright protection for an unpublished manuscript, he may not also assert a common law right to prevent performance:

"The common law right exists until the statute has been invoked and rights created thereunder, or the common law right has otherwise been abandoned; and this is so in one case as in the other. The author has the right of election, that is, he may content himself with his common law copyright, or he may elect to substitute therefor the right afforded by the statute by complying with its provisions, whereupon the extent of his copyright and the remedies for infringement are governed by the statutory provisions" (emphasis supplied) (18 Cal. 2d 424).

The *Loew's* case thus decided *nothing* with reference to the effect of performance by the owner of common law rights. That decision came nine years later in the *Stanley* and *Golding* cases, discussed in our main brief, which squarely hold that performance under circumstances similar to those in the instant case, *does not dedicate*.

Section 2 of the Copyright Act, 170 U. S. C. 2, 61 Stats. 652 (1947) reserves to the author his common

law rights. Defendants concede this (Appellees' Op. Br. p. 16). Those rights have, always, as we pointed out above, been considered *perpetual* in nature. The policy of Congress is clear. To obtain the benefits of the Copyright Act, the author surrenders his common law rights, but if he does not wish to do so, his common law rights—rights always considered perpetual in duration—remain intact. This fundamental principle is expressly recognized in *Loew's Incorporated v. Superior Court*, 18 Cal. 2d 419, 424 (1941), and forms the basis for the *Stanley* and *Golding* decisions.

In casting about for authority, defendants cite two cases decided by this Court, *Marx v. United States*, 96 F. 2d 204, 206 (9th Cir., 1938), *White v. Kimmel*, 193 F. 2d 744, 746-747 (9th Cir., 1952) (Appellees' Ans. Br. p. 27). These cases are cited for the proposition that this Court has held a radio performance to be a publication. There was no radio performance in the instant case.

Furthermore, the *Marx* case does not stand for the proposition attributed to it by defendants. It was there held that deposit of a copy of a manuscript was sufficient to constitute a publication under Section 11 of the Copyright Act and, therefore, that section was constitutional. The court, in affirming appellant's criminal conviction for having infringed and aided and abetted the infringement of a copyrighted composition, does not even mention the problem of what constituted a dedication by an author or owner.

The *White* case did not involve performance of a musical or dramatic composition. It involved publication of a manuscript by mimeographing, the equivalent of printing.

Egner v. E. C. Schirmer Music Co., 48 Fed. Supp. 187 D. C. Mass., 1942), aff'd 139 F. 2d 398 (1st Cir., 1943), cited by appellees involved abandonment by the

author who permitted his song to be indiscriminately used by others. No such situation exists here. The point is not discussed by the Court of Appeals, which decided the case on other grounds.

RCA Mfg. Co., Inc. v. Whiteman, 114 F. 2d 86 (2d Cir., 1940), cert. den. 311 U. S. 712, 61 S. Ct. 393, 85 L. Ed. 463 (1940), cited by appellees involved the general "absolute" sales of phonograph recordings to the public. No such fact exists here. No recording for sale was ever made by plaintiff. Moreover, the *Whiteman* case is no longer authority in the jurisdiction where it was decided. *Capitol Records v. Mercury Records Corporation*, 221 F. 2d 657, 663 (2d Cir., 1955):

"Our conclusion is that the quoted statement from the RCA case is not the law of the State of New York."

See also, *Waring v. WDAS*, 327 Pa. 433 (1937); *Waring v. Dunlea*, 26 Fed. Supp. 338 (D. C. E. D. N. C., 1939), Note Harv. L. Rev. 171 (1937).







